(14)

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 240

THE KENILWORTH COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED JANUARY 5, 1925

(30,791)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 22, 1925

[fol. 1]

IN COURT OF CLAIMS

No. C-762

THE KENILWORTH COMPANY

v.

THE UNITED STATES

I. PETITION—Filed June 20, 1923

To the Chief Justice and Judges of the Court of Claims:

Your petitioner, The Kenilworth Company, respectfully shows to your Honors the following facts:

I

Petitioner is a corporation duly organized and existing under the laws of the State of North Carolina, owning valuable property on the outskirts of the city of Asheville, in said State, consisting of a hotel and about ten and one-half acres of land, highly improved with roads, driveways and planting. Petitioner has always borne true faith and allegiance to the United States Government and never aided or abetted war or rebellion against that Government.

II

Said city of Asheville and the country thereabouts having an exceedingly pleasant and salubrious climate, the city, with its immediate environs, is and for many years has been, a famous resort, both of pleasure seekers and of invalids seeking restoration to health. On the land owned by petitioner there stood, for some twenty years before petitioner acquired the property, a large and handsome hotel known as the "Kenilworth Inn," famous throughout [fol. 2] the country for its excellent appointments and service, as well as its admirable location, which hotel was patronized by persons of wealth and refinement, who demanded a very high degree of comfort and luxury and all possible security and safeguards for their health. Said hotel was one of a few hotels of high class in and near said city in which persons known or suspected to be ill of tuberculosis or any contagious or obnoxious disease were not entered or admitted. Said original "Kenilworth Inn" was destroyed by fire in the year 1909, and petitioner, having acquired the property in 1916, built and equipped the present hotel, which is also known as the "Kenilworth Inn" in the years 1916 and 1917, expending thereon the sum of eight hundred and fifteen thousand dollars ($815,000); the replacement value of which said hotel was, at the times hereinafter referred to, as your petitioner is advised,

informed and believes, more than one million, five hundred thousand dollars ($1,500,000). Said present "Kenilworth Inn" was designed and constructed solely for the entertainment of persons, having ample means, who traveled, and patronized hotels of the best class, for pleasure and luxurious living, and it was petitioner's purpose that no person suffering with contagious or obnoxious diseases of any nature should be entertained or received in said hotel under any circumstances.

III

During the fall of the year 1917, and when said "Kenilworth Inn" building was nearing completion and petitioner was making plans and preparations for opening said hotel as such on or before the 1st day of January, 1918, petitioner was approached by representatives of the United States Government with a view to procuring a lease [fol. 3] on said hotel and premises for use as a hospital for disabled officers and soldiers, and, pursuant to the negotiations between petitioner and authorized officers and agents of the United States Government petitioner, by a contract entered into on or about the 21st day of January, 1918, with the War Department of the United States government, leased said "Kenilworth Inn" and premises to the United States, for use as a hospital until the 30th day of June, 1918, at a rental of nine thousand five hundred eighty-three dollars and thirty-three cents ($9,583.33) per month, a copy of which contract of lease, excepting only the formal parts, is attached hereto marked "Exhibit A" and made a part hereof. Two similar contracts, in renewal of the original contract, were thereafter signed between petitioner and such officers and agents of the United States Government, which said renewal contracts were identical with said original contract except as to dates and the amounts of the rent. The stipulated terms thereof expired successively on June 30, 1919, and June 30, 1920.

IV

On account of conditions existing in said city of Asheville and vicinity, resulting from its dual reputation and fame as a resort for both health and pleasure seekers, of which the agents and officers of the United States Government negotiating said lease were fully advised, no hotel could be successfully operated in said vicinity unless it established and strictly enforced the rule that no person suffering with tuberculosis or any contagious or obnoxious disease could, under any circumstances, be housed or entertained therein, and, unless the reputation of a hotel in said vicinity was zealously guarded and protected in this respect its value as a hotel would be destroyed. At [fol. 4] the outset of the negotiations between said officers and agents of the United States and the officers of petitioner, from which the contract of lease hereinbefore referred to resulted, the officers of petitioner stated and made known to said officers and agents of the United States that any lease made of said "Kenilworth Inn" and premises must be made subject to the distinct condition, under-

standing and agreement that no person suffering with tuberculosis or any contagious or obnoxious disease could be housed and treated in said building, and an original proposal of petitioner, dated December 11, 1917, made at the request of, and addressed to, the War Department of the United States, contained the following provision:

"The building and property are to be leased to the Government for the purpose of a convalescent hospital for disabled officers or soldiers, but it is especially understood, and the lease shall so provide, that no part of the property shall be used for the purpose of treating or housing any person suffering from tuberculosis in any form, or from smallpox, or any other like contagious or obnoxious disease, provided, however, that this shall not apply to a person suffering from tuberculosis housed temporarily in said premises for an operation or the like."

In submitting the aforesaid proposal to the War Department for the lease of Kenilworth Inn, the president of petitioner transmitted with the same a letter dated December 11, 1917, addressed to the Surgeon General, War Department, containing the following provision:

"Restriction Against Tuberculosis

"The restriction in the use of the property against the housing or treatment of patients suffering from tuberculosis, is from our stand-[fol. 5] point as the owners and future operators of the hotel, necessary, as such a use would forever destroy the property for the purpose for which it was constructed. The question of our ability, under proper medical advice, to renovate and disinfect the premises, thereby removing all danger of infection, does not arise—the danger of infection could no doubt be altogether removed, but it would cost us a fortune in advertising to convince the traveling public of this fact, and even with such an expenditure there would be no assurance of success in the undertaking. The same applies with equal and even more force to other contagious diseases of the character of smallpox, etc."

The contract of lease, hereinbefore referred to, though negotiated, and its terms and conditions agreed upon, by the officers of the Department of the Surgeon General of the United States Army in Washington, was signed and executed with the Quartermaster of the Army, Southeastern Department, at Charleston, to whom the proposals, after being approved and accepted by the proper officials of the Government, had been referred for the purpose of executing the formal contract required by law. Said Departmental Quartermaster, under date of January 17, 1918, wrote and transmitted to petitioner a letter, asking that it restate the proposed restriction against the treatment of persons suffering with tuberculosis or contagious diseases, and in response petitioner replied, in writing, under date of January 19, 1918, as follows:

"In obedience to your request contained in your letter of the 17th instant, we beg to restate Paragraph 2 of our proposal to the Surgeon General for the leasing of Kenilworth Inn, making the same to read as follows:

" '(2) The building and property are to be leased to the Govern-[fol. 6] ment for the purpose of a convalescent hospital for disabled officers and soldiers, but it is especially understood, and the lease shall so provide, that no part of the property shall be used for the purpose of receiving for treatment any persons suffering from tuberculosis in any form, or from smallpox, or any other like contagious or obnoxious disease; provided, however, that this shall not apply to a person suffering from tuberculosis, housed temporarily in said premises, for the purpose of an operation or the like.' "

Said original contract of lease, Exhibit A hereto, and all contracts in renewal thereof, made by the War Department of the United States Government, contained the following stipulation and provision:

"That the building and property are leased to the Government for the purpose of a convalescent hospital for disabled officers and soldiers, but it is especially understood that no part of the property shall be used for the purpose of receiving for treatment any person suffering from tuberculosis in any form, or from smallpox, or any other like contagious or obnoxious disease; provided, however, that this shall not apply to a person suffering from tuberculosis housed temporarily in said premises, for the purpose of an operation or the like."

V

Almost immediately after the War Department of the United States took possession of said Kenilworth Inn and premises, and began its operation as a hospital, the United States, in violation and total disregard of the express terms and conditions of said contract of lease, received and housed for prolonged treatment in said building, a great number of persons suffering from tuberculosis and contagious and obnoxious diseases, and kept and maintained said per-[fol. 7] sons in said building in large numbers and for prolonged periods; and this misuse of the property and violation of the terms and conditions of said lease, in spite of the earnest objections and protests of petitioner and its insistence upon the removal of said forbidden patients, continued during the entire term of the occupancy of the property by the War Department, under its original lease and the two successive renewals thereof.

VI

In addition to the treatment in said building for prolonged periods of officers and soldiers suffering with tuberculosis and contagious and obnoxious diseases, the Government, in violation of the terms of said contract, and over the objections and earnest protests

of petitioner, and in total disregard of its rights under said contract, housed and treated in said building a large number of German interned prisoners, who were at the time suffering with a malignant type of typhoid fever, and a large number of whom died while being so housed and treated in said inn.

VII

Under date of February 3, 1919, and during the time of the violation of the contract hereinbefore referred to, petitioner addressed and transmitted to the Surgeon General of the United States Army, a letter of protest in the following language:

"Somewhat to our surprise, we find that your department, in violation of the terms of the contract of lease made by our company with the United States Government, has been using Kenilworth Inn for the treatment of tuberculosis, typhoid fever, and other obnoxious and contagious diseases.

[fol. 8] "In view of the fact that at the time the Government took this property for hospital purposes we vigorously protested against the taking of the property if it was to be used for the treatment of such diseases, and in view of the fact that the Government at that time recognized the justness and reasonableness of our position in the matter and inserted a provision in the contract of lease prohibiting the treatment of such diseases in the building, we were very much surprised at the information that such diseases had been treated there for some time and that quite a number are still being treated in the hospital.

"This property was built primarily for a resort hotel, and the fact that such diseases have been treated in the building, in violation of the Government's contract, will render the property virtually valueless to the owner for some time to come.

"We assume, of course, that this action on the part of the Government was knowingly done, and that they will expect to make a proper adjustment of the injury to the property, and we would appreciate it if you would advise us as to what the decision of your department is in the matter."

Following said letter, the president of petitioner, being alarmed at the continued disregard by the Government of the terms of said contract, and being alarmed at the resulting destruction of the value of said property of your petitioner, employed, at great expense, able and influential counsel and in company with said counsel he came to the city of Washington, and earnestly protested to the Surgeon General of the Army and to the Secretary of War, in person, against the misuse of said property and breaches of said contract, and thereupon the Surgeon General and Secretary of War assured him that just compensation would be made to petitioner for the resulting damage.

[fol. 9]

VIII

Petitioner did not at any time consent, either expressly or by its silence, to the wrongful use of said property; but, on the other hand, at all times it vigorously and earnestly protested against said wrongful use, and did all in its power to procure a discontinuance thereof.

IX

Before the expiration of the last petitioner's said contracts, said hotel property was turned over by the War Department to the Treasury Department, for the use of the Public Health Service. This was done under a contract executed between petitioner and the Secretary of the Treasury, becoming effective on the 8th day of November, 1919, and by its terms extending for five years from that date. A copy of the provisions of said contract is attached hereto, marked "Exhibit B," and made a part hereof. Under said contract said Health Department held and used said property until the 31st day of December, 1922. Said contract included various and sundry residences and property not owned by petitioner, but which were rented and procured by petitioner and included in said contract for the convenience of the Government. The actual rental paid by the United States and received by petitioner for said Kenilworth Inn property alone was seventy thousand dollars ($70,000.00) per annum, to November 9, 1922.

X

During its said tenancy of said property, the Public Health Service received and maintained and treated therein many tubercular patients and others suffering from other contagious or offensive diseases.

[fol. 10]

XI

Said tenancy of said property by the Public Health Service was terminated by a contract signed between petitioner and the Director of the Veterans' Bureau as of the 10th day of November, 1922, under which petitioner was to resume possession, and it did resume possession of said property on the 1st day of January, 1923. A copy of the provisions of said contract is hereto attached, marked "Exhibit C," and made a part hereof. Under the terms of said contract, the United States paid, and petitioner with respect to said Inn property received, only the sum of twenty-seven thousand, one hundred eighty-eight dollars and eighty-eight cents ($27,188.88) rental, the balance of the amount paid under said contract being to cover certain repairs and replacements agreed upon, and rental on the aforesaid property not owned by petitioner, but included in the last mentioned contract for the convenience of the Government.

XII

As a result of the treatment in said Kenilworth Inn, by the War Department of the Government, of persons suffering with tuberculosis and persons suffering with other obnoxious and contagious diseases, all of which said facts were generally and widely known in and around Asheville and throughout the country, the reputation of said Kenilworth Inn as a tuberculosis hospital was during the years 1918 and 1919 firmly established with the traveling and pleasure-seeking public, and as a result its value as a hotel, for which it was designed and constructed, was almost if not completely destroyed; and such reputation still continues. By reason of said damage to its reputation, the rental value of said property now is, and for the five years following after December 31, 1922, will be [fol. 11] eighty thousand dollars ($80,000.00) per annum less than it would have been but for such injury; and the market value is diminished not less than four hundred thousand dollars ($400,000.00). The cost of restoring it fully to the condition in which the War Department received it from petitioner, by fumigation, tearing out and replacing of interior walls, plaster, decorations, plumbing and equipment, would have been three hundred and twenty-five thousand dollars ($325,000.00).

XIII

Said Kenilworth Inn property could not be used, and is of no material comercial value except for the purpose for which it was designed and constructed, namely, a resort hotel. One of the busiest and most prosperous seasons for the hotel trade in and about said city of Asheville was and is March, April and May. Upon resuming possession of its said building on January 1, 1923, as narrated hereinbefore, petitioner made haste to, and did, repair the same so far as was possible and furnished and equipped it adequately, and on the 17th day of March, 1923, opened it, and since has conducted it, as a hotel. The time was not sufficient, nor was petitioner financially able to reconstruct the interior of the building, to the extent indicated in paragraph XII hereinbefore, in order to restore it fully to the condition in which the War Department received it in 1918. But, beside repairing the breakage and other damage with respect to which it had received thirty-one thousand, four hundred sixty-two dollars and three cents ($31,462.03), it spent a large amount in removing factors of contagion with said infectious and obnoxious diseases and evidences that such diseases had been housed and treated therein. The purpose of this opera- [fol. 12] tion of the property was to gain publicity for it and, as far as possible, to cause the public to forget that it had been used in the housing and treatment of tubercular and other contagious and offensive diseases, and petitioner had no hope that such operation of the property could be conducted without a serious money loss. In reality the business so inaugurated, although conducted

with skill and reasonable economy, has constantly lost mu money, and for a long time it necessarily will entail such loss.

Petitioner prays judgment against the United States in the su of six hundred thousand dollars ($600,000.00); the same bei entirely unpaid and petitioner's claim thereto not having bee assigned wholly or in part.

The Kenilworth Company, by Benj. Carter, Attorney i Fact. Junius G. Adams, Benj. Carter, Attorneys f Claimant.

Duly sworn to by Benj. Carter. Jurat omitted in printing.

[fol. 13] EXHIBIT A TO PETITION

These articles of agreement, Entered into this 21st day of January 1918, between K. J. Hampton, Lt. Col. Quartermaster Corps, U. S Army, for and in behalf of the United States of America (herein after designated as lessee), of the first part, and The Kenilworth Com pany (a corporation existing under the laws of the State of North Carolina), of Asheville, in the County of Buncombe, and State o North Carolina (hereinafter designated as lessor), of the secon part, witness:

That the said parties do hereby mutually covenant and agree t and with each other as follows:

1. That the said lessor shall, and by these presents does hereby lease, demise, and let to the lessee the following described premises, to have and to hold the same with their appurtenances unto the lessee, for the term beginning with February 1, 1918, and ending with June 30, 1918, at the rate per month and under the conditions named below, viz: The property known and described as Kenilworth Inn and the grounds thereof in the Town of Kenilworth, near the City of Asheville, County of Buncombe, State of North Carolina, as shown on the plot hereto attached and made a part hereof, same containing approximately four acres of land, and described as follows:

Beginning at stake on south bank of Swannanoa River, n. 10 deg. 2 5 min., w. 212 feet, thence s. 62 deg. 52 min. w. 50 feet, thence n. 9 deg. 35 min. w. 195 feet, thence n. 49 deg. 14 min. e. 542.03 feet, thence n. 23 deg. 40 min. w. 140 feet to east side of drive south and west of main building; thence along east side of drive 42 deg. 45 min. w. 65 feet, n. 5 deg. 01 min. w. 75 feet, n. 9 deg. 14 min. e. 85.55 feet, n. 9 deg. 53 min. w. 25.54 feet, n. 23 deg. 47 min. w. 57.1 feet, n. 38 deg. 47 min. w. 173.5 feet and n. 14 deg. 53 min. e. 72.1 feet to a point on south side of drive in rear of main building, thence along south side of drive, n. 70 deg. .05 min. e. 82.35 feet, thence n. 15 deg. 55 min. w. 600 feet to south side of Calendonia Road, thence along south side of Calendonia Road 87 deg. 48 min. e. 80 feet, n. 76 deg. [fol. 14] e. 86.5 feet, n. 67 deg. 28 min. e. 88.9 feet, and n. 42 deg. 25 min. e. 60 feet, and n. 42 deg. 25 min. e. 60 feet, to intersection

with west side of Woodland Road, thence along west side of Woodland Road s. 12 deg. 15 min. e. 142 feet, s. 57 deg. 45 min. 142 feet, s. 6 deg. e. 78 feet, s. 16 deg. 45 min. w. 63.05 feet and s. 18 deg. 50 min. e. 197.07 feet to southeast side of Calendonia Road, thence along southeast side of road, n. 67 deg. 37 min. e. 136.36 feet, thence s. 63 deg. 40 min. e. 251.31 feet to northeast side of road, thence along side of road s. 37 deg. 30 min. e. 130.05 feet to line of southeast side of road, thence crossing road and following southwest side of road s. 15 deg. 15 min. e. 136 feet, s. 35 deg. 50 min. w. 200 feet, s. 12 deg. 10 min. w. 215 feet, s. 16 deg. 13 min. w. 102 feet, s. 27 deg. 13 min. w. 99.5 feet, s. 11 deg. 43 min. w. 98.3 feet, s. .5 degree. 20 min. e. 109.5 feet to angle in road, thence s. 15 deg. 20 min. e. 190 feet to south side of Swannanoa River, thence along the south side of river in a westerly direction, 1,010 feet, to point of beginning.

That the aforementioned Kenilworth Company has completed the erection of Kenilworth Inn in accordance with the plans and specifications, which were submitted to the Surgeon General of the Army, except that no partitions or dividing walls, indicated in red on said plans, shall be installed. It being understood that all heating equipment and lighting fixtures are to be installed in the building, but the aforementioned Kenilworth Company shall not provide any furniture or operating equipment.

That the building and property are leased to the Government for the purpose of a convalescent hospital for disabled officers and soldiers, but it is especially understood, that no part of the property shall be used for the purpose of receiving for treatment any person suffering from tuberculosis in any form, or from smallpox, or any other like contagious or obnoxious disease; provided, however, that this shall not apply to a person suffering from tuberculosis housed temporarily in said premises, for the purpose of an operation or the like.

That the Government shall maintain all buildings, equipment and machinery in good condition and repair and that at the termination [fol. 15] of the lease deliver the same up to the aforementioned Kenilworth Company, in as good condition and repair as when leased, usual wear and tear and acts of God to be excepted.

That the Government shall pay to the aforementioned Kenilworth Company for the use of the aforementioned property, a monthly rental of Nine Thousand, Five Hundred Eighty-three Dollars and Thirty-three Cents ($9,583.33) for each month of the term hereof and should the Government desire to renew the lease as provided for under Article 9 hereof it shall pay a monthly rental of Nine Thousand, Five Hundred Eighty-three Dollars and Thirty-three Cents ($9,583.33) for the first seven months of said renewal term and a monthly rental of Six Thousand Two Hundred Fifty ($6,250.00) Dollars for each month thereafter for said renewed term, to be paid in accordance with Paragraph 4 hereof.

2. That said lessor will warrant and defend to the lessee, its officers and agents, the quiet and peaceful possession and occupancy

of the aforesaid premises, and in case of any disturbance, by suit or otherwise, will defend the same free of charge to the Government in or before the proper State or United States Courts.

3. That the said lessor shall keep said premises in good repair to the satisfaction of the Government officer in charge. All buildings and other improvements fixed to or erected or placed in or upon the said premises by the lessee shall be and remain the exclusive property of the lessee; provided, however, that the same, unless sold or otherwise disposed of, shall be removed by the lessee within 90 days after the said premises are vacated under this lease.

4. That for and in consideration of the faithful performance of the stipulations of this agreement, the lessee shall pay to the said lessor or agent the sum or sums stated in Article 1 hereof. Payment shall be made at the end of each calendar month, or as soon thereafter as is practicable, at the office of the contracting officer or by a disbursing officer designated, in funds furnished for the purpose by the Government. Should the premises be relinquished before the [fol. 16] close of the monthly period, the rental for the last period shall be only the pro rata part of the monthly rental, depending upon the time of occupancy.

5. That it is expressly agreed and understood that this lease shall be non-effective until an appropriation adequate to its fulfillment is granted by Congress and is available, except in so far as is necessary to provide for the necessities of the service as authorized by Section 3732 of the Revised Statutes of the United States. However, in order to provide for the necessities of the service as authorized by said section, it is agreed that the premises specified herein, so far as authorized by said section, shall be occupied by the lessee as contemplated by this lease, and that payment of the rental shall be made as soon as is practical after funds are appropriated and are available.

6. That no Member of or Delegate to Congress, or Resident Commissioner, nor any person belonging to or employed in the military service of the United States, is, or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom, but under the provisions of Section 116 of the Act of Congress approved March 4, 1909 (35 Stat. L., 1109), this stipulation, so far as it relates to members of or delegates to Congress or resident commissioners, shall not extend, or be construed to extend, to any contract made with an incorporated company for its general benefit.

7. That the lessor hereby stipulates that no part of the money received as rental will be given to the occupant of the above-described premises, or to the person for whose benefit or use they were hired, or to any one for him, nor will any rebate be given on said rental for the benefit of any such person.

8. That the lessee reserves the right to quit, relinquish and give up the said premises at any time within the period for which this lease is made or may be renewed, by giving to the said lessor or agent — days' notice in writing.

9. That, at the option of the lessee, this lease, with all its covenants and agreements, may be renewed yearly as often as the needs of the [fol. 17] public service may require, so as to give the lessee continuous possession of the premises, not extending, however, beyond one year after a treaty of peace has been signed between the United States and Germany, but no renewal shall be made to include more than one fiscal year.

In witness whereof, the parties aforesaid have hereunto placed their hands the date first hereinbefore written. The officer of the United States whose name is signed below certifies that the rate stated in this lease is not in excess of the commercial rental value of the premises named and that said rate is the amount to be actually paid to the lessor for their own use, and that there are no public buildings, quarters, or ground available for use as specified in this lease, and that the rate stipulated in this lease is a fair rental value of reasonably good premises suitable for the purposes stated herein, in the locality where situated.

Exhibit B to Petition

The Treasury Department, for and in behalf of the United States of America (hereinafter designated as lessee) of the first part, and the Kenilworth Company, of Asheville, North Carolina (hereinafter designated as lessor) of the second part, do hereby covenant and agree to and with each other as follows:

1. That the said lessor shall, and by these presents does hereby lease, demise and let to the lessee the following-described premises, to have and to hold the same with their appurtenances unto the lessee for the term beginning with November 8, 1919, and ending with November 8, 1924, at the rates per annum and under the conditions hereinafter named, viz:

2. All those certain lots, blocks and parcels of land situate, lying and being in the town of Kenilworth, in the County of Buncombe, and State of North Carolina, and being more particularly bounded and described as follows:

(a) Beginning at a stake in the southern margin of Calendonia Road, at the extreme northern corner of the Myers property, and [fol. 18] running thence with the eastern and southern margin of Calendonia Road in a northerly and easterly direction to the northwest corner of Lot No. 10 of Block K, of the Kenilworth plat; thence crossing Calendonia Road to the northwest corner of Lot No. 12 of Block F, the same being in the southern margin of Forest Road, * * *

(b) That certain tract or parcel of land containing 10.5 acres, known as the hotel site tract, lying to the east and south of the extension of Calendonia Road, upon which the Kenilworth Inn is

situated, and also the following lots with residences, buildings and other improvements thereon; Lots Nos. 9, 11, 14 and 24 of Block E of the plat of the property of the Kenilworth Development Company. Lots Nos. 1, 6 and 16 of Block F of said plat; Lots Nos. 1, 2 and 3 of Block K of said plat, and Lots Nos. 75, 76, 77, 78, 79, 95, 96 and 97 of the Hotel Block of said plat.

Excepting and reserving from this proposal a small triangle in the northeast corner of said Lot No. 11, described as follows: Beginning at a stake in the southern margin of Chiles Avenue at the northeast corner of said lot and runs thence with the eastern line of said lot s. 3 deg. 43 min. e. 100 feet to a stake in the same; thence n. 18 deg. .08 minutes w. 100 feet to a stake in the southern margin of Chiles Avenue; thence with said margin of Chiles Avenue n. 72 deg. 15 min. e. to the beginning.

3. The United States shall take possession of all lands and buildings thereon in their present condition and state of repair without obligation on the part of the lessor to alter, improve, or repair the same at its own expense; should the lessee request the lessor to alter, improve, or repair the premises, the lessor hereby agrees to do same to the satisfaction of the Surgeon General of the Public Health Service within a reasonable time to be set by that officer, at the expense of the lessee, under the provisions of Paragraph 4, Clause b. The lessee at the end of this lease, by lapse of time or otherwise, shall yield up said premises in good condition, ordinary wear and tear, fire, elements, and acts of public enemy excepted, subject to the provisions of Paragraph 8 hereof.

[fol. 19] 4. The United States of America shall pay to the said Kenilworth Company as rental for said property during said term of five years the sums hereinafter stated, payable in 60 equal installments, paid at the end of each calendar month or as soon thereafter as is practicable:

For the property embraced in Proposal (a)..... $86,000
For the property embraced in Proposal (b)..... 444,000

and reimbursement forthwith of (1) the actual cost of any alterations in the demised premises or of any improvements (the cost of which improvements shall *shall* not exceed ($100,000) that may be placed thereon by the lessor at the request of the lessee, and (2) the actual cost of replacing the property in the same shape and condition as at the time the Government took possession, ordinary wear and tear, fire, elements, and acts of public enemy excepted. Provided, that the extent of such restoration and the costs of same, as well as the costs of the alterations and improvements referred to in this paragraph, shall be ascertained by the Surgeon General, Public Health Service, whose decision shall be binding on both parties hereto; and, provided, also, that the Government shall not be liable for any rent during such time as such restoration may continue after the date the Government vacates the property.

5. If during the term hereinbefore specified, any of the buildings or improvements on the demised premises shall be destroyed by fire, or other casualty, or shall, from any cause not the fault of the lessee, become untenantable or unfit for occupancy in the judgment of the Surgeon General of the Public Health Service, the rental hereinbefore specified shall be reduced annually by a sum equal to 10% of the value of the buildings or other improvements so destroyed or rendered untenantable and of the sites thereof, which vacated sites shall then become subject to the provisions of Proposal (a); provided, however, that in case the United States exercises its option to purchase the entire property, said vacated sites shall come within [fol. 20] the provisions of the 33⅓% "credit and remittance" clause of Proposal (b) for such period as the buildings were tenantable by the lessee; and the option price hereinafter specified shall be reduced by an amount equal to the value of the said building or improvement; but there shall be no obligation on the part of the Kenilworth Company to rebuild or replace such destroyed or untenantable buildings or improvements except as to the hotel building and the power house serving the same, and failing the restoration of the last named buildings, or either of them, within a time to be set by the Surgeon General of the Public Health Service, this agreement may be canceled at the option of the lessee.

6. The United States shall have the right and option to purchase said property at any time during the said term of five years on the following terms and conditions:

Property included in Proposal (a)	$287,000.00
Property included in Proposal (b)	888,000.00

and the Kenilworth Company shall credit and remit to the United States of America an amount equal to thirty-three and one-third per cent of the total rent paid for said property, mentioned and described in this proposal, up to the date of the payment of the purchase price therefor, thereby reducing the purchase price by an amount equal to thirty-three and one-third per cent of the amount of the rent so paid.

The United States shall not acquire or attempt to acquire any part or parcel of said land and premises less than the whole included within the two said proposals, or at prices less than stipulated above, which, after a careful and exhaustive investigation and examination by the agents of the Treasury Department, has been fixed and ascertained as the reasonable and fair market value of said property.

7. Should the United States of America exercise its option to purchase said lands as hereinbefore provided, the rental hereinbefore reserved and agreed to be paid shall cease from and after the date of the actual payment of the purchase price of said lands.

[fol. 21] 8. Should the United States fail to exercise its option to purchase, as hereinbefore provided, all buildings and other improvements fixed to or erected or placed in or upon the said premises at the instance of the lessee shall be and remain the exclusive property of the lessee; provided, however, that the same, unless sold or other-

wise disposed of, shall be removed by the lessee within ten days after the said premises are vacated under this lease.

9. The said lessor will warrant and defend to the lessee, its officers and agents, the quiet and peaceable possession and occupancy of the demised premises, and in case of any disturbance, by suit or otherwise, will defend the same free of charge to the Government in or before the proper State or United States Courts.

10. That no Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom.

11. Should the United States of America exercise its option to purchase said land as hereinbefore provided, The Kenilworth Company agrees to furnish to the United States Attorney for the Western District of North Carolina, promptly upon receipt of notice and without any additional expenses to the United States of America, an accurate survey of the property hereinbefore described and included within the terms of this proposal, prepared in accordance with the specifications therefor of the Treasury Department, as well, also, all requisite abstracts, official certifications and evidences of title necessary in the opinion of the Attorney General of the United States to vest in the Government a good and valid title to said property, free and clear of all liens and encumbrances whatsoever.

Exhibit C to Petition

Supplemental articles of agreement made and entered into this tenth day of November, A. D. 1922, by and between The Kenilworth [fol. 22] Company (of Biltmore, N. C.), a corporation created, organized, and existing under the laws of the State of North Carolina, party of the first part, and the United States of America, by C. R. Forbes, Director, U. S. Veterans' Bureau, party of the Second part:

Witnesseth:

That, whereas, the party of the first part, by two formal, duly-executed instruments in writing—one dated November 19, 1919, and the other dated July 26, 1920—leased to the United States of America (represented by an Assistant Secretary of the Treasury), for use of the United States Public Health Service, for hospital purposes certain lots, blocks, and parcels of land, with appurtenances, structures, fixtures, and rights thereunto belonging, situate, lying, and being in the Town of Kenilworth, North Carolina, to which said respetive leases reference is hereby made and the same made a part hereof as though fully set forth herein; and,

Whereas, occupancy and use, for hospital purposes, of said demised premises have been continuously exercised to the present date by the said lessee, under color of said leases, through and by its lawful instrumentalities, as follows:

(a) By the U. S. Public Health Service, a bureau of the Treasury

Department, from initial occupation under said leases to and including April 30, 1922; and,

(b) Thereafter, on and from May 1, 1922, by the U. S. Veterans' Bureau, in accordance with the specific mandatory provisions of Executive Order of April 29, 1922, transferring, as of May 1, 1922, the supervision, management, and control of said premises (known as U. S. Veterans' Hospital No. 45), to the Director, U. S. Veterans' Bureau; and,

Whereas—in view of the availability and proximity of other functioning government-owned or leased hospitals; of the cost per day, per bed, in said Hospital No. 45 of approximately Six Dollars ($6.00), which is in excess of such cost at other hospitals of the U. S. Veterans' Bureau, and therefore uneconomical—it is advan-
[fol. 23] tageous to the party of the second part to vacate said premises at the earliest possible date; and,

Whereas, by the terms, provisions and conditions of said leases the rental obligation and liability of the said party of the second part in the absence of a formal renewal for the ensuing fiscal year, extends to and terminates on June 30, 1923, in amount of approximately seventy-two thousand two hundred sixty-six one-hundredths ($72,266.66), and said party of the second part, upon vacation of said demised premises, is obligated to make restoration as specified in aforementioned lease instruments, and remove or sell "all buildings and other improvements fixed to or erected or placed in or upon the said premises," by it; and,

Whereas, after careful, detailed, and conjoint examination of said premises, and by mutual agreement between the parties hereto, the actual cost of all restoration in and to said premises for which the party of the second part is liable under said leases has been determined and fixed at thirty-one thousand four hundred sixty-two and three one-hundredths dollars ($31,462.03), making a total liability of the said lessee up to June 30, 1923, of approximately one hundred three thousand seven hundred twenty-eight and sixty-nine one-hundredths dollars ($103,728.69), and,

Whereas, it is desired that certain refrigerating, kitchen, and hydro-therapy equipment, property of the party of the second part, now installed in said hospital, be purchased by the party of the first part, in order to reduce the restoration liability of the party of the second part, and the incident cost of removal, transportation, etc., and the present cash value of said equipment has been mutually determined and fixed by the parties hereto at Four Thousand Five Hundred Dollars ($4,500.00) and

Whereas, it has been mutually agreed by and between the parties hereto that the liability for fixed rental to June 30, 1923, should be materially reduced by reason of vacation of said premises by December 31, 1922:

[fol. 24] Now, therefore, in consideration of the premises; the vacation by party of the second part of the said demised premises on December 31, 1922; the discharge of the United States from all liability for fixed rental under said leases, from and after January 1, 1923, and from restoration of premises as required by said basic leases; and agreement of lessor to purchase the specified refrigerating,

kitchen, and hydrotherapy equipment for the sum of Four Thousand Five Hundred Dollars ($4,500.00) to apply in diminution of amount fixed as restoration, it is hereby mutually agreed by and between the parties hereto that said leases of November 19, 1919, and July 26, 1920, are hereby amended so that the termination thereof shall be on and as of December 31, 1922, and that rental thereunder for the period November 1, 1922, to December 31, 1922, shall be, and is hereby fixed, at seventy-two thousand one hundred twenty-eight and seventy one-hundredths dollars ($72,128.70), payable in two equal monthly installments in arrears.

Party of the first part, in consideration of the terms, provisions, and conditions of this Supplemental Agreement, hereby releases the party of the second part, its officers, agents, servants, and employees, all and singular, from any and all claims or demands of every name and nature, except the rental hereinabove provided, directly or indirectly arising from, connected with, or incident to, occupancy and use of said premises and property under said leases, and this Supplemental Agreement.

[fol. 25] General Traverse—Filed Aug. 20, 1923

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

III. Amendment to Petition—Filed December 5, 1922

Claimant, by leave of court amends its petition by striking out the words "six hundred thousand dollars ($600,000.00)" in the last paragraph and inserting in lieu thereof "eight hundred and sixty-five thousand dollars ($865,000.00)."

Benj. Carter, Attorney for Claimant.

IV. Argument and Submission

On December 5, 1923, this case was argued and submitted on merits by Messrs. H. W. Kinder, Benjamin Carter and Junius C. Adams, for plaintiff, and by Mr. Herman J. Galloway, for defendant.

[fol. 26] V. **Findings of Fact, Conclusion of Law, Appendices "A" and "B," and Opinion of the Court by Booth, J.**—Filed January 21, 1924

This case having been heard by the Court of Claims, the court upon the evidence, makes the following

Findings of Fact

I

The plaintiff is, and was during the different transactions hereinafter set forth in these findings, a corporation duly incorporated as a stock company under the laws of the State of North Carolina for the purpose of carrying on the hotel business in said State, and as such was the owner of a tract of land located at Biltmore railroad station in the village of Kenilworth, one and a half miles from Asheville, North Carolina, on which a hotel, known as "The Kenilworth Inn," was constructed for the accommodation of 450 guests, at a cost of $815,000, of which $710,000 was borrowed on bonds maturing in 17 years.

II

On December 11, 1917, plaintiff proposed to the War Department to enter into a lease with the Government for the rent of the Kenilworth Inn and about four acres of ground for the duration of the present war and to terminate one year after the signing of a treaty of peace between the United States and Germany, the hotel to be completed in accordance with the plans submitted with said proposal, with certain indicated omissions of partitions, and the Government to pay a rent of $125,000 a year for the first year of said lease, and $75,000 a year for each additional year of said lease, payable semi-annually in advance. The proposal contained the following restriction upon the use of said building:

"(2) The building and property are to be leased to the Government for the purpose of a convalescent hospital for disabled officers or soldiers, but it is especially understood, and the lease shall so provide, that no part of the property shall be used for the purpose of treating or housing any person suffering from tuberculosis in any form, or from smallpox or any other contagious or obnoxious disease, provided, however, that this shall not apply to a person suffering from tuberculosis housed temporarily in said premises for an operation or the like."

[fol. 27] The plaintiff was informed by the proper officer of the Quartermaster Corps that the law in force prohibited the making of any lease by the Government extending beyond June 30, the end of the fiscal year, but that such lease might provide for extensions for an indefinite period, and in the present instance to one year after the making of a treaty of peace between the United States and Germany; that payment of rent in advance was also prohibited by law, and that the Government would not pay over $115,000 rent for the first year's use of the building; that the Government also objected to the use of the words "of treating" in the restriction upon the use of the building and suggested in lieu thereof the words "of receiving for treatment." The plaintiff was asked to restate its lease in accordance with the above suggestions. Accordingly, the plaintiff finally restated its proposal in the above particulars as follows:

"(2) The building and property are to be leased to the Government for the purpose of a convalescent hospital for disabled officers and soldiers, but it is especially understood, and the lease shall so provide, that no part of the property shall be used for the purpose of receiving for treatment any person suffering from tuberculosis in any form, or from smallpox, or any other like contagious or obnoxious disease, provided, however, that this shall not apply to a person suffering from tuberculosis housed temporarily in said premises for the purpose of an operation or the like."

"(4) The Government shall pay to this company for the use of said property a monthly rental of $9,583.33 for each month of the term thereof, and should the Government desire to renew said lease, it shall pay a monthly rental of $9,583.33 for the first seven months of said renewed term and a monthly rental of $6,250 for each month thereafter of said renewed term, the rent to be paid monthly on the first day of each month covering the rent for the calendar month just passed.

"(5) The term of the lease proposed to be executed shall commence on the first day of February, 1918, and end on the 30th day of June, 1918; but the Government shall have the right and privilege under the contract of renewing the lease from year to year, for and during the continuation of the present war with Germany, and for one year after a treaty of peace has been signed between the United States and the German Government. It is desired, but not insisted upon by this company, that the contract of lease contain a clause while not binding on the Government in specific terms to continue the lease in force for the duration of the war and one year, but at the same time stating that this is the spirit or understanding between the contracting parties."

The proposal to rent said hotel, amendments suggested by the Government and restated proposal are embraced in Appendix A to these findings and are made part of this finding by reference thereto.

The original proposal of December 11, 1917, was accompanied by a letter to the Surgeon General containing the following extract:

Restrictions Against Tuberculosis

"The restrictions in the use of the property against housing or treatment of patients suffering from tuberculosis is, from our stand- [fol. 28] point as the owner and the future operators of the hotel, necessary, as such a use would forever destroy the property for the purpose for which it was constructed. The question of our ability, under proper medical advice, to renovate and disinfect the premises and thereby remove all danger of infection does not arise—danger of infection could no doubt be altogether, but it would cost us a fortune in advertising to convince the travelling public of the fact, and even with such an expenditure there would be no assurance of success in the undertaking. The same applies with equal and even more force to other contagious diseases of the character of smallpox."

III

On January 21, 1918, the plaintiff entered into an agreement with an authorized officer of the Quartermaster Corps for the lease of the Kenilworth Inn and about four acres of land described by metes and bounds, the said lease to begin on February 1, 1918, and to end on June 30, 1918, with the stipulation, "That the building and property are leased to the Government for the purpose of a convalescent hospital for disabled officers and soldiers, but it is especially understood that no part of the property shall be used for the purpose of receiving for treatment any person suffering from tuberculosis in any form, or from smallpox, or any other like contagious or obnoxious disease, provided, however, that this shall not apply to a person suffering from tuberculosis housed temporarily in said premises for the purpose of an operation or the like," and "That the Government shall pay to the aforementioned Kenilworth Company for the use of the aforementioned property a monthly rental of nine thousand five hundred eighty-three dollars and thirty-three cents ($9,583.33) for each month of the term hereof, and should the Government desire to renew the lease as provided for under article 9 hereof it shall pay a monthly rental of nine thousand five hundred eighty-three dollars and thirty-three cents ($9,583.33) for the first seven months of said renewed term and a monthly rental of six thousand two hundred fifty dollars ($6,250) for each month thereafter for said renewed term. * * * Payment shall be made at the end of each calendar month, or as soon thereafter as is practicable. * * * Should the premises be relinquished before the close of the monthly period, the rental for the last period shall be only the pro rata part of the monthly rental, depending upon the time of occupancy.

The contract also provided that the Government at the termination of the lease should deliver all buildings, equipment, and machinery to plaintiff "in as good condition and repair as when leased, usual wear and tear and acts of God excepted," and that the said lease might be extended at the option of the Government yearly, beginning at the end of the fiscal year for each renewal, but not to extend beyond one year after the signing of a treaty of peace between the United States and Germany. The hotel at the date of this contract was in an unfinished condition.

The building was completed on April 9, 1918, at which time the Medical Corps of the Army first occupied the same as a hospital, designated as No. 12. The plaintiff at the date of the lease was in need of funds, and the Government in order to hasten the completion of the building paid the rent for February and March, 1918. [fol. 29] This rent the plaintiff afterwards refunded to the Government in the autumn of 1918. The builder, working on a cost-plus contract, had become financially involved, and the plaintiff had to complete the hotel. The Quartermaster Corps, by proper authority, renewed the said lease of January 21, 1918, to run from July 1, 1918 to June 30, 1919, and from July 1, 1919, to June 30, 1920.

Major William H. Smith, Medical Corps, was assigned to the

command of said hospital some time in February, 1918, and was succeeded on October 20, 1918, by Major John B. McCreary, Medical Reserve Corps, who appears to have remained in command until the hospital was transferred to the Public Health Service.

IV

On November 1, 1919, the plaintiff addressed a communication to the Secretary of the Treasury proposing to lease for five years beginning on November 8, 1919, the Kenilworth Inn, and the tract on which it was located, and certain other lots owned by the Kenilworth Development, with the residences, buildings, and other improvements thereon, for the sum of $444,000 as rental therefor, payable in 60 equal installments of $7,400 each, with an option on the part of the Government to purchase said property at any time during said term of five years for the sum of $888,000, with a provision that the Government should maintain said buildings, machinery, equipment, fixtures, and appurtenances in good condition and repair, usual wear and tear and acts of God excepted.

On the same date, November 1, 1919, the plaintiff wrote another letter to the Secretary of the Treasury proposing to lease for a term of five years beginning November 8, 1919, certain lots, blocks, and parcels of land in the town of Kenilworth and certain others upon which buildings and residences had been built, belonging to the Kenilworth Home Company and private persons, for the sum of $86,000 as rental therefor, payable in 60 equal installments of $1,435 each, with an option on the part of the Government to purchase said property at any time during said term of five years. There was a stipulation that on failure of the Government to exercise the option, all buildings or improvements placed on said land by the Government should become the property of the owners of the land.

Neither of the above proposals contained any restriction upon the use of said hotel in the reception for treatment of tubercular patients or those suffering from contagious or obnoxious diseases, as was done by the agreement of January 21, 1918.

Pursuant to section 2 of the act of March 3, 1919, 40 Stat. 1302, the War Department on November 8, 1919, transferred to the Public Health Service, Treasury Department, among other parcels of land, the Kenilworth Inn and hotel site.

On November 19, 1919, the two proposals of plaintiff dated November 1, 1919, were accepted, and a lease agreement dated November 19, 1919, demising the lots and parcels of land described in said proposals, embracing the Kenilworth Inn and site, was entered into between the Treasury Department and plaintiff for a term of five years, from November 8, 1919, to November 8, 1924.

For the lots and buildings described in proposal (a) the Government agreed to pay to plaintiff as rental for the term of five years [fol. 30] the sum of $86,000, and for the Kenilworth Hotel and site and the other lots and buildings described in proposal (b) the Government agreed to pay to the plaintiff as rental for the term of five years, the sum of $444,000, each of said sums to be paid in

equal installments. The contract also gave the Government the ion of purchasing at any time, within said term of five years, the operty described in proposal (a) for $287,000 and the property scribed in proposal (b) for $888,000.

The Government agreed at the end of said lease to give up said emises in the same condition as when it took possession, ordinary ar and tear, fire, elements, and acts of the public enemy excepted. e said contract contained no provision restricting the use of said tel by the Government in the reception for treatment of tubercular tients, or patients suffering from contagious or obnoxious diseases. The hotel after November 8, 1919, was designated hospital No. 45 the Public Health Service.

On July 26, 1920, the plaintiff and the Treasury Department tered into a contract supplemental to the contract of November , 1919, for the erection of two cottages in 50 and 65 days, respecely, for rental by the Government until November 8, 1924, at 00 per month each, with an option to purchase the same during period of occupancy hereunder at $10,000 each.

The proposals (2) dated November 1, 1919, and the supplemental reement of July 26, 1920, are attached to these findings as Apndix B and are made part of this finding by reference thereto. ne material part of the agreement of November 19, 1919, is atched to plaintiff's petition as Exhibit B, and is made a part of this ding by reference thereto.

V

During the period from February 1, 1918, to November 8, 1919, nen the contract with the War Department was in force, the Disease index, medical cards," Form No. 52, Medical Department, classified by the hospital authorities of the United States Army neral hospital No. 12, Biltmore, N. C., shows the admission of 119 tients on whose cards the word "tuberculosis" is mentioned. None these patients was received in said hospital for treatment of tuberlosis. Sixty were discovered after observation and diagnosis to free from tuberculosis, the others being received for operations, e treatment of concurrent diseases or both, or for observation. ose discovered to be suffering from tuberculosis were transferred a tubercular hospital as soon as practicable. It was not the purse or practice of the authorities of the Medical Corps having d hospital in charge to house tubercular patients therein otherwise an temporarily.

After the Public Health Service took charge of said hotel as hospi- No. 45, on November 8, 1919, patients suffering from pulmonary berculosis were housed and treated therein.

VI

The disease index medical cards of the United States general hostal No. 12, Biltmore, N. C., mention 55 cases of syphilis or gon- [vol. 31] orrhea treated during the period the hotel was under the

control of the War Department, from February 1, 1918, to November 8, 1919. Of these, 19 cases were discovered on diagnosis to have no venereal disease, 15 required an operation or the treatment of a concomitant disease requiring admission to the hospital, 3 were admitted for other than venereal diseases and the venereal disease developed after some time in the hospital. Of the whole number only 17 showed venereal conditions not requiring operations and not accompanied by other diseases. Of this 17, 7 were members of the organization at hospital No. 12, officers or enlisted men, 3 were members of a labor organization working in a nearby forest who walked from there to the hospital, 4 were taken sick near the hospital and presented themselves for admission, and 3 were transferred to hospital No. 12 without authority under the regulations. A venereal ward was maintained in the hospital during the period it was under the control of the War Department. A large proportion of those in the venereal ward were negroes. The patients affected with venereal diseases were coming to and going from the hospital all the time.

Syphilis is a contagious disease, and in the secondary and tertiary stage where open lesions or sores appear on face or body, it is obnoxious. Its contagion is practically limited to sexual contact. It may be communicated otherwise if abrasions of the skin should come in contact in any way with matter from an open sore or lesion on a person affected with syphilis, but the probability of this is decreased by the fact that the organisms of syphilis, if taken from the body and allowed to dry, die within twenty-four hours, and, unlike tuberculosis, leave no traces on the floor or walls of the room.

VII

In the latter part of the summer of 1918 one hundred and ninety interned Germans, principally sailors from merchant marine vessels caught in American ports when the war with Germany was declared suffering with typhoid fever in an acute stage, were transferred from Hot Springs, North Carolina, to hospital No. 12, four of whom died en route and seven died at different times after their arrival. These prisoners were sent to the hospital and kept there under the direct supervision of the Surgeon General's office. Special officers were placed in charge of them and a most elaborate study of typhoid fever was made in connection with the treatment of these patients, and special records were kept, and a special report made that constitutes one of the volumes of the medical and surgical history of the war.

Typhoid fever is a communicable disease. It is not contagious in the ordinary acceptation of the word. It is usually contracted by drinking water which has become contaminated by the organisms of typhoid from discharges from the intestines, through the feces or through the urine, finding their way into the water supply. It is also contracted by eating food prepared or handled by a person who has typhoid fever or is recovering from it, or who is what is termed a carrier of the disease. The organisms of typhoid die very quickly and, like the organisms of syphilis, leave no traces on the

floor or walls of the room. When a typhoid patient leaves a room and it is exposed to dry air and sunlight all danger of contracting the disease from that room disappears.

[fol. 32] VIII

Smallpox is regarded by the medical profession as the most contagious of diseases, with the exception of measles. It is also an obnoxious disease, and during the pustular stage is a revolting sight, disagreeable to the eye, to the sense of smell, and most objectionable in every way. Typhoid and syphilis are both communicable diseases, but are not contagious like smallpox, which may be contracted by coming within a few feet of persons suffering from it. The average case of typhoid is not obnoxious. Syphilis, except in the advanced stages where sores appear on the face and body, is not an obnoxious disease.

IX

The occupancy of the Kenilworth Inn by the Government as a general hospital, excluding therefrom patients with tuberculosis and other contagious or obnoxious diseases, would have reduced the rental value of the property as a hotel after its surrender by $50,000 per annum. What further reduction, if any, in rental value was caused by the housing and treatment of patients suffering from tuberculosis, typhoid, or venereal diseases does not satisfactorily appear from the evidence.

X

During the period the Kenilworth Inn was leased to the Public Health Service, the plaintiff received $70,000 per annum from the Government for the hotel property and paid out $80,000 per annum for insurance, taxes, payments on bonds, and upkeep.

XI

During the period the Kenilworth Inn was held as hospital No. 12 by the War Department under the contract of January 21, 1918, repeated protests were made by plaintiff to the proper officials of the War Department against the housing and treatment of tubercular and syphilitic patients.

XII

On August 2, 1921, the plaintiff presented a petition to the Secretary of War (1) for damages to its hotel property by the Government during the period it was under the control of the War Department from February 1, 1918, to November 8, 1919, in the sum of $158,721.32; (2) damages for breach of its contract of January 21, 1918, by receiving, housing permanently, and treating in its hotel building soldiers afflicted with tuberculosis and other contagious and obnoxious diseases, in the sum of $500,000.

The claim was investigated and considered by the War Department Claims Board, appraisal section, which on October 26, 1921, made an award to the plaintiff on item 1 as full, final, and complete

satisfaction of all present and future claims for damages to said hotel property growing out of its use by the War Department in the sum of $70,359.54.

[fol. 33] Plaintiff's claim (item 2) for breach of contract alleged to have been caused by receiving, housing, and treating cases of tuberculosis, typhoid, and syphilis was denied without prejudice to its right to pursue its claim in the proper forum.

The plaintiff, on October 27, 1921, received the award of $70,359.54 as payment in full for all damages to its hotel building, but specifically excepted from the receipt its claim for breach of contract.

The total amount found to be due was $81,066.28, but the Public Health Service agreed to pay $10,707.28.

The amount of $70,359.54 was paid by Treasury warrant dated November 1, 1921. When or how, if at all, the $10,707.28 was paid by the Public Health Service does not appear from the evidence.

XIII

On November 10, 1922, supplemental articles of agreement were entered into between plaintiff and the Government, through the Director of the United States Veterans' Bureau, by which it was stipulated that the plaintiff, in consideration of its agreement that the contracts of November 19, 1919 and July 26, 1920, for the term of the leases of the Public Health Service, instead of running up to June 30, 1923, should terminate on December 31, 1922, should be paid the sum of $72,128.70 in two equal monthly installments in arrears as rental under said contracts from November 1, 1919, to December 31, 1922. Of this amount the plaintiff received $27,188.88 as rental for the two months from November 1, 1919, to December 31, 1922, for the hotel property, and the balance as two months' rent for other property included in said leases, and for repairs to the hotel and such other properties.

XIV

After an expenditure for furniture and equipment of $161,875.21 the Kenilworth Inn was opened on March 10, 1923, for the reception of guests. During March the average number of regular guests was 30, April, 35, and May, 22, and for June up to the 20th the number was 18. From March 10 to March 16, 1923, the hotel entertained the national insurance convention with a daily average of 90, the highest number any day being 194. The North Carolina Medical Society was entertained at the hotel from April 12 to 17, 1923, the average count per day was 92 and the highest number registered any day was 180. The full guest capacity of the hotel was 450. The spring trade at Asheville is the highest grade, the rates shown by the hotel records were from $9 to $15 per day, depending on the number of rooms per person. There may be a crowded house run from July to September and 90 per cent in September, 75 per cent in October, and 66 per cent to January; during the latter month 50 per cent. In February trade begins to pick up, and in March, April, and the first 10 days in May there should be a good house. Dur-

ing the summer months of June, July, August, and September the rates are 10 per cent less than for the other months of the year. The room used for a venereal ward during Government occupation was used by the hotel management after it was opened as a hotel for a ladies parlor.

The business of the Battery Park Hotel, an old hotel in Asheville, during March and April, 1923, fell off $3,500 and in May a great [fol. 34] deal more than that, owing to the noise of excavation near it for the erection of a new hotel. About the 20th of April, 1923, all Asheville hotel business dropped off more quickly than usual. The period from March 10, 1923 to June 1, 1923 was taken by plaintiff to indicate the amount of business done by the Kenilworth Inn because the witnesses testifying in relation thereto were examined on June 21, 1923. During that period, two and two-thirds months, if the rent should be fixed at the rate paid by the Public Health Service for two and two-thirds months, $15,555.55 and miscellaneous expenses of $4,301.02, advertising $8,236.83 and advances made to guests, $7,566.07, none of which is satisfactorily established as legitimate expenses of operation for that period, should be eliminated from the expenses charged, the net loss in operating the hotel for that period would amount to $9,714.72.

Conclusion of Law

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the petition herein should be, and the same is, dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this cause, the amount thereof to be entered by the clerk and collected by him according to law.

Appendix A

Washington, D. C., December 11, 1917.

War Department, Washington, D. C.

Dear Sir: The Kenilworth Company, a North Carolina corporation, hereby proposes to enter into a contract of lease with the Government of the United States, whereby this company will lease to, and the Government agrees to take, for and during the term or time of duration of the present existing war with Germany, and for one year thereafter a treaty of peace shall be entered into between the United States and Germany, the property known and described as Kenilworth Inn, and the grounds thereof, in the town of Kenilworth, near the city of Asheville, in the State of North Carolina, including approximately four acres of bottom land on the Swannoa River and west of Kenilworth Road, upon the following terms and conditions:

(1) This company shall complete the erection of Kenilworth Inn, in accordance with the plans which are herewith submitted, except that no partitions or dividing walls indicated in red on said plans shall be installed, it being understood that all heating equipment and lighting fixtures are to be installed in the building, but this company shall not provide any furniture or operating equipment.

(2) The building and property are to be leased to the Government for the purpose of a convalescent hospital for disabled officers or soldiers, but it is especially understood, and the lease shall so provide, that no part of the property shall be used for the purpose of treating or housing any person suffering from tuberculosis in any form, or from smallpox or any other like contagious or obnoxious [fol. 35] disease, provided, however, that this shall not apply to a person suffering from tuberculosis, housed temporarily in said premises for an operation or the like.

(3) It is understood and agreed, and the lease shall provide, that the Government shall maintain all buildings, equipment and machinery in good condition and repair, and at the termination of the lease deliver the same up to this company in as good condition and repair as when leased, usual wear and tear and acts of God to be excepted.

(4) The Government shall pay to this company, as rental for said property, the sum of one hundred twenty-five thousand ($125,000) dollars for the first year of the term of the lease, and seventy-five thousand ($75,000) dollars, for each and every additional year of the term; the rent to be paid semiannually in advance, the first six months' rent to be paid upon the execution of the lease.

(5) The term of the lease proposed to be executed shall commence upon the completion of the building in accordance with the terms hereof, or upon the Government's taking possession of the premises, if it should desire to do so before the full completion of the building.

On account of the necessity in the change of the plans of construction, this proposal is required to be made for immediate acceptance.

Respectfully submitted.

The Kenilworth Company, by —— ——, President.

Headquarters Southeastern Department, Office of Quartermaster

Charleston, S. C., January 12, 1918.

From: Department Quartermaster.
To: Kenilworth Company, Kenilworth, Asheville, N. C.
Subject: Kenilworth Inn, Kenilworth, Asheville, N. C.

1. This office is in receipt of your offer of December 11, 1917, to lease Kenilworth Inn and the grounds thereof to the Government; also the authority to enter into a lease with you for this property.

2. Before entering into the lease it is necessary that your offer be restated, as certain of the terms contained therein are in conflict

with certain laws and regulations governing the entering into leases by the Government; one regulation is that no lease can extend beyond the close of any fiscal year; that is all Government leases terminate on June 30, that date being the end of the fiscal year. Hence, the lease made now can not extend beyond June 30, 1918; however, there is a provision in the lease giving the Government the right of renewal for an indefinite time, which in this instance will be one year after a treaty of peace is signed between the United States and Germany. A lease entered into at the termination of the lease beginning February 1, 1918, and ending June 30, 1918, would be for a year, and would terminate on June 30, 1918.

3. Section 3648, Revised Statutes, prohibits the Government from making payments in advance for any services or the delivery of articles of any description; accordingly, you could not be paid the rent in advance. Therefore, you are asked to redraft paragraph [fol. 36] 4 of your offer. However, it is understood from a letter from the Surgeon General of the Army that the rental for the first year shall be $115,000. For your information the lease can be so made as to provide for monthly payments of the rent on the 1st of the month for the calendar month just passed. In view of this statement, and also that the lease entered into now can not extend beyond June 30, 1918, you are asked to restate the terms of your offer contained in the introductory and fourth paragraph.

4. You are further asked to furnish this office with six blue prints or sketches of the property showing the boundary lines of the whole tract, giving the courses and distances, naming the owner or owners; giving any buildings, landmarks, water courses, roads, or other permanent improvements; State, county, etc., and the name of the engineer, scale, and date.

5. In addition, you are asked to give the name of the corporation and in what county it is located, and under the laws of what State it is incorporated; also the names of the president and secretary and six certificates of the resolution giving these officers—mentioning their names—the authority to sign for the corporation.

6. A prompt reply to this communication giving the information desired, and the blue prints and certificates requested, will enable this office to make an early completion of the lease.

By direction:

R. C. Gresham, 2d Lieut. Q. M. Corps, N. A., Asst. to Quartermaster.

Asheville, N. C., January 15, 1918.

Surgeon General, United States Army, Washington, D. C.

SIR: In accordance with the directions of the quartermaster of the Southeastern Department, we are restating our proposal to you of December 11, 1917, covering the leasing of the Kenilworth Inn and grounds to the Government, changing and amending it to conform with the regulations pointed out by the quartermaster's office:

The Kenilworth Company, a North Carolina corporation, hereby proposes to enter into a contract of lease with the Government of the United States, whereby this company will lease to and the Government agrees to take, for the term of time from February 1, 1918, to June 30, 1918, the property known and described as Kenilworth Inn, and grounds thereof, in the town of Kenilworth, near the city of Asheville, in the State of North Carolina, including approximately four acres of bottom land on the Swannanoa River, and west of Kenilworth Road, upon the following terms and conditions:

(1) This company shall at once complete the erection of Kenilworth Inn, in accordance with the plans and specifications which were heretofore submitted to you, except that no partitions or dividing walls indicated in red on said plans shall be installed; it being understood that all heating equipment and lighting fixtures are to be installed in the building, but this company shall not provide any furniture or operating equipment.

(2) The building and property are to be leased to the Government for the purpose of a convalescent hospital for disabled officers or [fol. 37] soldiers, but it is especially understood, and the lease shall so provide, that no part of the property shall be used for the purpose of treating or housing any person suffering from tuberculosis in any form, or from smallpox, or any other like contagious or obnoxious disease, provided, however, that this shall not apply to a person suffering from tuberculosis, housed temporarily in said premises for an operation or the like.

(3) It is understood and agreed, and the lease shall provide that the Government shall maintain all buildings, equipment, and machinery in good condition and repair, and at the termination of the lease deliver the same up to this company in as good condition and repair as when leased, usual wear and tear, and acts of God to be excepted.

(4) The Government shall pay to this company, as rental for said property, the sum of one hundred and fifteen thousand ($115,000) dollars for the first year of the term of the lease, and seventy-five thousand ($75,000) dollars, for each and every additional year of the term; the rent to be paid monthly on the first day of each and every month during the term of the lease, covering the rent for the calendar month just passed.

(5) The term of the lease proposed to be executed shall commence on the 1st day of February, 1918, and end on the 30th day of June, 1918; but the Government shall have the right and privilege under the contract of renewing the lease from year to year, for and during the continuation of the present war with Germany, and for one year after a treaty of peace has been signed between the United States and the German Government. It is desired, but not insisted upon by this company, that the contract of lease contain a clause, while not binding the Government in specific terms, to continue the lease in force for the duration of the war and one year;

but at the same time stating that this is the spirit or understanding between the contracting parties.

Respectfully submitted, The Kenilworth Company, by ——
——, President.

Headquarters Southeastern Department, Office of Quartermaster

Charleston, S. C., January 17, 1918.

From: Department Quartermaster.
To: Kenilworth Company, Kenilworth, Asheville, N. C.
Subject: Kenilworth Inn, Kenilworth, Asheville, N. C.

1. In reply to your letter 15th inst., and the offer therein to lease Kenilworth Inn and the grounds thereof to the Government for hospital purposes, this office requests you to restate paragraph 4 of the offer. This request is made in view of the fact that the lease entered into February 1, 1918, will expire June 30, 1918; and any statement covering amount to be paid for rental for "first year of the term of the lease" or "the first 12 months of the term of the said lease" would not be correct, for while the lease will contain a provision giving the right of renewal to one year after a treaty of peace is signed between the United States and Germany, and yet the lease [fol. 38] by law, will end on June 30, 1918, and a new lease will have to be entered into at that time to cover the period from July 1, 1918, to June 30, 1919, provided the Government desires to renew the lease.

2. Further, it is desired to change paragraph 2 of your offer so that it shall read, "the building and property are to be leased to the Government for the purpose of a convalescent hospital for disabled officers or soldiers, but it is especially understood, and the lease shall so provide, that no part of the property shall be used for the purpose of receiving for treatment any person suffering from tuberculosis in any form, or from smallpox, or any other like contagious or obnoxious disease, provided, however, that this shall not apply to a person suffering from tuberculosis, housed temporarily in said premises, for the purpose of an operation or the like."

3. This office will appreciate your prompt reply in order that there may be no delay in executing the lease.

By direction:

R. C. Gresham, 2d Lieut., Q. M. Corps, N. A., Asst. to Quartermaster.

(Recorded.)

Asheville, N. C., January 19, 1918.

From: The Kenilworth Company, Asheville, N. C.
To: Quartermaster, Southeastern Department.
Subject: Kenilworth Inn, Kenilworth, Asheville, N. C.

1. In obedience to your request contained in your letter of the 17th, instant, we beg to restate paragraph 2 of our proposal to the

Surgeon General for the leasing of Kenilworth Inn, making the same to read as follows:

"2. The building and property are to be leased to the Government for the purpose of a convalescent hospital for disabled officers and soldiers, but it is especially understood, and the lease shall so provide, that no part of the property shall be used for the purpose of receiving for treatment any person suffering from tuberculosis in any form, or from smallpox, or any other like contagious or obnoxious disease, provided, however, that this shall not apply to a person suffering from tuberculosis, housed temporarily in said premises, for the purpose of an operation or the like.

We also restate paragraph 4 of the proposal, making the same to read as follows.

"4. The Government shall pay to this company for the use of said property a monthly rental of $9,583.33 for each month of the term thereof, and should the Government desire to renew said lease, it shall pay a monthly rental of $9,583.33 for the first seven months of said renewal term and a monthly rental of $6,250 for each month thereafter of said renewed term, the rent to be paid monthly on the first day of each month covering the rent for the calendar month just passed."

It is hoped that this will meet with your approval and that the lease can be executed without delay.

Very truly yours, The Kenilworth Company, by ——— ———, President.

[fol. 39] APPENDIX B

Asheville, N. C., November 1, 1919.

To the Secretary of the Treasury, Washington, D. C.

SIR: The Kenilworth Company hereby proposes to lease to the United States of America, for the term of five years beginning the 8th day of November, 1919, and expiring on the 8th day of November, 1924, at the rental or charge, and upon the terms and conditions hereinafter set forth, all those certain lots, blocks, and parcels of land, together with the existing buildings and improvements thereon, situate, lying and being in the town of Kenilworth, in the county of Buncombe and State of North Carolina, and being more particularly bounded and described as follows, to wit:

That certain tract or parcel of land containing 10.5 acres, known as the hotel site tract, lying to the east and south of the extension of Caledonia Road, upon which the Kenilworth Inn is situated, and being fully described in the deed of the Kenilworth Development Company to the Kenilworth Company, which said deed and contract are duly recorded in the office of the register of deeds for Buncombe County, reference thereto being hereby made; as well

Also the following lots with residences, buildings and other improvements thereon; that is to say, lots Nos. 9, 11, 14, and 24 of block E of the plat of the property of the Kenilworth Development Com-

pany, which is duly recorded in the office of the register of deeds for Buncombe County, and to which reference is hereby made:

Lots Nos. 1, 6, and 16 of block F of said plat;

Lots Nos. 1, 2, and 3 of block K of said plan and

Lots Nos. 75, 76, 77, 78 ,79, 95, 96 and 97 of the hotel block of said plat.

Excepting and reserving from this proposal a small triangle in the northeast corner of said lot No. 11, described as follows: Beginning at a stake in the southern margin of Chiles Avenue at the northeast of corner of said lot and runs thence with the eastern line of said lot S. 3 degrees 43 minutes E. 100 feet to a stake in the same; thence N. 18 degrees 08 minutes W. 100 feet to a stake in the southern margin of Chiles Avenue; thence with said margin of Chiles Avenue N. 72 degrees 15 minutes E. to the beginning.

Terms and Conditions

(1) The United States of America shall pay to the said The Kenilworth Company as rental for said property during said term of five years the sum of four hundred and forty-four thousand ($444,000) dollars, payable in sixty (60) equal monthly installments of seven thousand four hundred ($7,400) dollars each.

(2) It is expressly stipulated, understood, and agreed that the United States of America is to take possession of said lands and buildings thereon in their present condition and state of repair without obligation on the part of the undersigned to alter, improve, or repair the same, and that the United States of America shall, during the term hereinbefore specified, maintain said buildings and all [fol. 40] machinery, equipment, fixtures and appliances incident thereto, or connected therewith, in good condition and repair, usual wear and tear and acts of God excepted, and that in all cases where any of said machinery, equipment and appliances shall, during said term, be destroyed or rendered unserviceable by use or abuse, that the same shall be replaced by the United States of America.

(3) It is expressly stipulated and agreed that should, during the term hereinbefore specified, any of the buildings on said lands be destroyed by fire, that there shall be no obligation on the part of the Kenilworth Company to rebuild or replace the same; provided, however, that the rental hereinbefore specified shall be reduced annually by a sum equal to 10 per cent of the value of the building and other improvements so destroyed, and the option price hereinafter specified shall be reduced an amount equal to the value of the building or improvements so destroyed.

(4) The United States of America shall have the right and option to purchase said property at any time during the said term of five years at the price of eight hundred and eighty-eight ($888) dollars, which, after a careful and exhaustive investigation and examination by the agents of the Treasury Department has been fixed and ascertained as the reasonable and fair market value of said prop-

erty; provided, however, and it is expressly stipulated and understood that should the United States of America exercise its option to purchase said property it shall and will, at the same time, exercise its option to purchase certain lands fully described and included in a certain proposal bearing even date herewith and made by the undersigned, the Kenilworth Company, to the Secretary of the Treasury, it being expressly stipulated and agreed that the United States of America shall not acquire, or attempt to acquire, any part or parcel of said lands or premises less than the whole included within the two said proposals, or at a price less than that stipulated in said proposals as the reasonable and fair market value of said property.

(5) It is stipulated and understood that should the United States of America exercise its option to purchase said lands and buildings thereon hereinbefore particularly described, as hereinbefore provided, the Kenilworth Company shall credit and remit to the United States of America an amount equal to thirty-three and one-third per cent of the total rent paid for said property, mentioned and described in this proposal, up to the date of the payment of the purchase price therefor, thereby reducing the purchase price by an amount equal to thirty-three and one-third per cent of the amount of the rent so paid.

(6) That should the United States of America exercise its option to purchase said lands as hereinbefore provided, the rental hereinbefore reserved and agreed to be paid shall cease from and after the date of the actual payment of the purchase price of said lands.

(7) It is stipulated and understood that should the United States of America fail to exercise its option to purchase said lands as hereinbefore provided, then and in that event all buildings and additions, or other improvements which may be placed upon said lands, or any part thereof, by the United States of America during the term of said lease shall be and become the property of the owner or owners of said lands.

[fol. 41] (8) Should the United States of America exercise its option to purchase said land as hereinbefore provided, the Kenilworth Company agrees to furnish to the United States attorney for the western district of North Carolina, promptly upon receipt of notice and without additional expense to the United States of America, an accurate survey of the property hereinbefore described and included within the terms of this proposal, prepared in accordance with the specifications therefor of the Treasury Department, as well, also, all requisite abstracts, official certifications, and evidences of title necessary in the opinion of [balance of paragraph missing from record].

(9) This proposal, if and when accepted by the Secretary of the Treasury, or an Assistant Secretary of the Treasury duly authorized to act in the premises, shall constitute a complete and binding contract between the Kenilworth Company and the United States of America.

The Kenilworth Company, by S. A. Lynch, President.

Attest: C. E. Holcumbe, Secretary. (Corporate Seal.)

Asheville, N. C., November 1, 1919.

To the Secretary of the Treasury, Washington, D. C.

SIR: The Kenilworth Company hereby proposes to lease to the United States of America, for the term of five years beginning on the 8th day of November, 1919, and expiring on the 8th day of November, 1924, at the rental or charge, and upon the terms and conditions hereinafter set forth, all those certain lots, blocks, and parcels of land, situate, lying and being in the town of Kenilworth, in the county of Buncombe and State of North Carolina, and being more particularly bounded and described as follows, to wit:

Beginning at a stake in the southern margin of Caledonia Road, at the extreme northern corner of the Myers property, and running thence with the eastern and southern margin of Caledonia Road in a northerly and easterly direction to the northwest corner of lot No. 10 of block K, of the Kenilworth plat; thence crossing Caledonia Road to the northwest corner of lot No. 12 of block F, the same being in the southern margin of Forest Road; thence with the southern margin of Forest Road S. 82 degrees 18 minutes E. 70.5 feet to a stake at the northwest corner of lot No. 11 of said block F; thence with the western line of lot No. 11 S. 3 degrees 07 minutes W. 116.4 feet to a stake in the northern line of lot No. 13 of said block F; thence with the northern line of said lot No. 13, S. 88 degrees 16 minutes E. 70 feet to a stake at the southwest corner of lot No. 10 of said block; thence with the western line of said lot No. 10 N. 3 degrees 01 minute E. 109.6 feet to a stake in the southern margin of Forest Road at the northwest corner of said lot No. 10; thence with the southern margin of Forest Road N. 88 degrees 52 minutes E. 198.45 feet to the intersection of the southern margin of Forest Road with the western margin of Kenilworth Road; thence [fol. 42] with the western margin of Kenilworth Road S. 18 degrees 08 minutes E. to a stake in said margin of Kenilworth Road standing S. 71 degrees 52 minutes W. 50 feet from the southwest corner of lot No. 14 of block E of the Kenilworth plat; thence crossing Kenilworth Road and running with the southern line of said lot No. 14 N. 71 degrees 52 minutes E. 250 feet to a stake at the southeast corner of said lot No. 14; thence with the eastern line of lots Nos. 15 and 16 of said block E., S. 18 degrees 08 minutes E. 180 feet to a stake at the southeast corner of said lot No. 16; thence with the southern line of said lot No. 16 S. 71 degrees 52 minutes W. 25 feet to a stake at the northwest corner of lot No. 17 of said block E; thence with the eastern lines of lots 17 to 23, inclusive, of block E., S. 18 degrees 08 minutes E. 560 feet to a stake at the northeast corner of lot No. 24 of said block E; thence with the northern line of said lot No. 24 of said block E., S. 72 degrees 52 minutes W. 178 feet to a stake in the eastern margin of Kenilworth Road; thence with the eastern margin of Kenilworth Road S. 33 degrees 20 minutes E. 82.9 feet to a stake at the northwest corner of lot No. 25 of said block E; thence with the northern line of said lot No. 25 N. 71 degrees 52

minutes E. 181.3 feet to a stake; thence south 18 degrees 08 minutes E. with the line of the Reed property 223 feet to a stake at the northeast corner of the Matthews lot; thence with the northern line of the Matthews lot S. 66 degrees 22 minutes W. 100 feet to a stake; thence with the western line of the Matthews lot S. 18 degrees 08 minutes E., crossing the Swannanoa Drive and the Swannanoa River to a stake on the south bank of said river; thence down and with the south bank of said river as the same meanders to a stake standing south 10 degrees 26 minutes E. 110 feet, more or less, from the southeast corner of what is known as the Odd Fellows lodge lot; thence N. 10 degrees 26 minutes W., crossing the Swannanoa River and the Swannanoa Drive, and with the eastern line of said Odd Fellows lodge lot 210 feet, more or less, to the northeast corner of said Odd Fellows lodge lot; thence with the northern line of said Odd Fellows lodge lot S. 62 degrees 52 minutes W. 50 feet to a stake at the northwest corner of said lot and in the east line of the property of the Vanderbilt estate; thence with the eastern line of the property of the Vanderbilt estate, Paquin and Myers, the following courses and distances: N. 9 degrees 35 minutes W. 1,064.4 feet to a stake, and N. 32 degrees 33 minutes W. 492 feet, more or less, to the beginning.

Reserving and excepting, however, from the terms and operation of this proposal that certain tract of land containing approximately 10.5 acres, known as the hotel site lying to the south and east of the extension of Caledonia Road, and fully described by metes and bounds in the deed of the Kenilworth Development Company to the Kenilworth Company, and the contract to convey from the Kenilworth Development Company to the Kenilworth Company, upon which is located Kenilworth Inn, said deed and contract being recorded in the office of the register of deeds for Buncombe County, North Carolina, and to which reference is hereby had; as well

Also the following lots upon which buildings or residences have been constructed; that is to say, Lots Nos. 8 and 9 of block P (the property of J. H. Caine and wife); lots 75, 76, 77, 78, 79, 95, 96, and [fol. 43] 97 of the hotel block (the property of the Kenilworth Home Company and E. C. Hester); lot No. 1 of block F (the property of Edward Holland); lots Nos. 2 and 3 of block K (the property of Mrs. Ryan); lots 6 and 16 block F (the property of Mrs. Elizabeth Smith), and lot No. 1 of block K (the property of J. M. Caldwell; as well

Also such public roads or streets as may be within the general boundaries hereinbefore described, it being only the intention of the owners of the property included within this proposal to include only such rights as it may have therein.

Terms and Conditions

(1) The United States of America shall pay to the said The Kenilworth Company as rental for said property during said term of five years the sum of eighty-six thousand one hundred ($86,100) dollars, payable in sixty (60) equal monthly installments of $1,435 each.

(2) The United States of America shall have the right and option to purchase said property at any time during the said term of five years at the price of two hundred and eighty-seven thousand ($287,000), dollars, which, after a careful and exhaustive investigation and examination by the agents of the Treasury Department, has been fixed and ascertained as the reasonable and fair market value of said property; provided, however, and it is expressly stipulated and understood that should the United States of America exercise its option to purchase said property that it shall and will, at the same time, exercise its option to purchase certain lands, with buildings thereon, fully described and included in a certain proposal bearing even date herewith and made by the undersigned, the Kenilworth Company, to the Secretary of the Treasury, it being expressly stipulated and agreed that the United States of America shall not acquire, or attempt to acquire, any part or parcel of said lands or premises less than the whole included within the two said proposals, or at a price less than that stipulated in said proposals as the reasonable and fair market value of said property.

(3) Should the United States of America exercise its option to purchase said lands as hereinbefore provided, the rental hereinbefore reserved and agreed to be paid shall cease from and after the date of the actual payment of the purchase price for said lands.

(4) It is stipulated and understood that should the United States of America fail to exercise its option to purchase said land as hereinbefore provided, then and in that event all buildings or other improvements which may be placed upon said land, or any part thereof, by the United States of America during the term of said lease shall be and become the property of the owner or owners of said land.

(5) Should the United States of America exercise its option to purchase said land as hereinbefore provided, The Kenilworth Company agrees to furnish to the United States attorney for the western district of North Carolina, promptly upon receipt of notice and without additional expense to the United States of America, an accurate survey of the property hereinbefore described and included within the terms of this proposal, prepared in accordance with the [illegible] 44] specifications therefor of the Treasury Department, as well, also, all requisite abstracts, official certifications and evidences of title necessary in the opinion of the Attorney General of the United States to vest in the Government a good and valid title to said property, free and clear of all encumbrances and liens whatsoever.

(6) This proposal, if and when accepted by the Secretary of the Treasury or an Assistant Secretary of the Treasury duly authorized to act in the premises, shall constitute a complete and binding contract between The Kenilworth Company and the United States of America.

The Kenilworth Company, by S. A. Lynch, President.

Attest: C. E. Holcombe, Secretary. (Seal The Kenilworth Company, Incorporated, Kenilworth, N. C.)

July 26, 1920.

The Kenilworth Company, Asheville, North Carolina.

GENTLEMEN: Pursuant to authority vested in the Secretary of the Treasury your proposal of July 6, 1920, to erect two cottages for Officers' quarters in connection with U. S. Public Health Service hospital, and all terms and conditions of the said agreement are the following terms and conditions:

1. That this acceptance is supplemental to the agreement entered into by you and the Treasury Department under date of November 19, 1919, leasing certain lands and improvements thereon for the use of the Public Health Service in the operation of the aforesaid hospital, and all terms and conditions of the said agreement are hereby made a part of this acceptance in so far as they may be applicable.

2. That the said cottages shall be erected on sites to be designated by the medical officer in charge of the aforesaid hospital, such sites to be on land included in proposal (a) of the agreement hereinbefore referred to in paragraph 1 hereof, and shall be constructed in accordance with with plans and specifications heretofore approved by the U. S. Public Health Service, copies of said plans and specifications being attached hereto and made a part hereof.

3. That one cottage shall be ready for delivery to and occupancy by the United States not later than fifty (50) days from the date of your assent to the terms and conditions of this acceptance, the other cottage to be ready for delivery to and occupancy by the United States not later than sixty-five (65) days from the date of such assent hereto. Time is of the essence of this acceptance and it is expressly understood and agreed that in the event the said cottages, or either of them, are not ready for delivery and occupancy at the time specified, the United States shall have the right to occupancy of said cottages, or either one thereof, without payment of rent, for a period in each instance equal to the period of delay, but you shall not be held responsible for any delay occasioned by strikes, accidents, or circumstances beyond your control, and no occupancy without payment of rent shall be claimed by the United States as a result thereof.

[fol. 45] 4. That the rent to be paid you by the United States shall be at the rate of one hundred dollars ($100) per month for each cottage, payable in arrears, rent hereunder in each instance to accrue beginning with the date of occupancy, except as provided for in paragraph 3 hereinabove.

5. That the term of occupancy hereunder for each cottage shall terminate on November 8, 1924, except that in the event of purchase by the United States the rental hereinbefore reserved and agreed to be paid shall cease from and after the date of the actual payment of the purchase price.

6. That the United States shall have the right or option to purchase either one or both of the said cottages at any time during the period of occupancy hereunder, the purchase price of each cottage being hereby expressly fixed at ten thousand dollars ($10,000), hereby expressly excepted from reduction under the "credit and remittance" clause contained in the option for purchase of items under proposal (b) of the agreement of November 19, 1919, hereinbefore referred to.

You are requested to retain the original of this communication and write upon the accompanying copy hereof, date and sign, your unqualified assent to the provisions hereof, and return such assent copy promptly to this department.

Respectfully, J. H. Moyle, Assistant Secretary.

Kenilworth, N. C., August 23, 1920.

We hereby unqualifiedly assent to the provisions in the above letter interpreting the acts of God to cover rainy days on which work is impossible; also that the price in the event of purchase is to be $10,000 for the house alone, the purchase of the lot being covered by the original contract with the Kenilworth Company.

Kenilworth Company, by J. M. Chiles, President.

OPINION

Booth, Judge, delivered the opinion of the court:

The Kenilworth Company is a North Carolina corporation, incorporated to build and operate a hotel. The company had in process of construction and near to completion a hotel building designed to accommodate 150 guests, which it had designated the Kenilworth Inn. The enterprise was an important one and involved the expenditure of $815,000. The building itself had so far progressed toward completion that on December 11, 1917, the company proposed to the defendant a lease of the entire building and grounds for a convalescent hospital for disabled officers or soldiers. It is not important, at present, to enter into details respecting various items of rental and other terms and conditions of the lease, which was finally executed on January 21, 1918, except the one and only cove-
[fol. 36] nant of the same which the plaintiff company now alleges the defendant not only failed to observe but positively breached.

The plaintiff company in its proposal set forth in paragraph two the following restriction upon the use of the building:

"(2) The building and property are to be leased to the Government for the purpose of a convalescent hospital for disabled officers or soldiers, but it is especially understood, and the lease shall so provide, that no part of the property shall be used for the purpose of treating or housing any person suffering from tuberculosis in any form, or from smallpox or any other like contagious or obnoxious disease, provided, however, that this shall not apply to a person suf-

fering from tuberculosis housed temporarily in said premises for an operation or the like."

The defendant refused to accept the restriction as proposed, and offered in its stead the following proposal:

"(2) The building and property are to be leased to the Government for the purpose of a convalescent hospital for disabled officers and soldiers, but it is especially understood, and the lease shall so provide, that no part of the property shall be used for the purpose of receiving for treatment any person suffering from tuberculosis in any form, or from smallpox, or any other like contagious disease, provided, however, that this shall not apply to a person suffering from tuberculosis housed temporarily in said premises for the purpose of an operation or the like."

The plaintiff accepted the modification of its proposal, and as thus worded by the defendant's officer the restriction as to use was inserted in the contract. The plaintiff company alleges and seeks to prove that in positive violation of the agreed restrictive use of its hotel building the defendant did receive and house for prolonged treatment in said building, and did keep and maintain therein for prolonged periods, a great number of persons suffering from tuberculosis, contagious, and like obnoxious diseases over the protest of the company, and during the entire time of its occupancy; that in addition to receiving for treatment officers and soldiers of the United States afflicted as aforesaid, a large number of interned German prisoners of war suffering from a malignant type of typhoid fever were received and treated at the hospital, many of whom died, resulting from the causes enumerated in a claimed damage to the reputation of the hotel whereby it has, for the time being at least, lost its attractive force as a public inn, and its use and income as such impaired to the extent of $865,000.

The argument advanced to sustain the above contention is predicated primarily upon the peculiar climatic conditions obtaining at Asheville, North Carolina, and vicinity. The city of Asheville itself possesses a most alluring aspect, dual in character, and because of its location and climate attracts thereto a large transient population seeking rest and recreation, and also a considerable number of patients seeking a cure for tuberculosis. Because of this situation and to avoid a conflict between the two elements, which would manifestly tend to injure the city's tourist population, most stringent local laws and regulations have been adopted by the municipality looking towards the complete isolation of tuberculosis patients from the remaining population, both permanent and transient. The repu- [fol. 47] tation of the town, generally known throughout the country, is such that the course thus pursued is indispensable to its maintenance, and any deviation therefrom is sufficient, especially if premises are let for tubercular patients, to practically destroy a building so demised for use for any other purpose, at least for a long term of years when such use may perhaps be forgotten.

The claim is likened to an injury to the reversion by a tenant in possession under a lease; not the commission of waste, etc., but

breach of contract, violation of an express contract. The measure of damages is concededly the extent of injury, not to the freehold itself, this having been satisfactorily adjusted, but to the contemplated use in the future, of the premises demised, it being alleged that it will require years to outlive the fact that patients of the kind proscribed in the lease were treated in the inn. Emphasis is put upon two cases decided by the Supreme Court of Massachusetts—Hersey v. Chapin, 162 Mass. 176, and Delano v. Smith, 206 Mass. 365. This case, in point of fact, is so directly opposed to the situation adjudicated in the cases cited that it is difficult to perceive their applicability. A tenant in possession of a dwelling house under a lease is assuredly obligated, as these cases hold, to refrain from subletting the premises for use as a smallpox hospital—a pesthouse—to the injury of the reversion. The distinction, a very important one, between the cases cited and the issue here is that the owner of the premises, the owner of the reversion, let the premises as an original proposition for use as a hospital. By its own lease the plaintiff contemplated the incidental injury to the reversion arising from mere use and occupation, if any such occurred, and is presumed to compensate itself therefor in the fixed rental. The issue here is a direct contractual relationship between the owner of the premises and the tenant, and an allegation of breach of the same. The mere fact that the plaintiff intended to use the building as a hotel is without significance. The owner was in nowise constrained to elect to rent it as a hospital instead. What the plaintiff did was to rent the building as a hospital, with a restrictive clause in the lease, and it is the violation of this clause, if any, for which recovery may be had. If the owner of a dwelling voluntarily demises the same as a hospital, may he recover damages because its use as a hospital prejudiced its future occupation as a dwelling? Manifestly not. The question we must meet is the ascertainment of a breach of the contract and the damages accruing from the breach.

The difficulty which confronts the court, granting arguendo the facts and the law as contended for, is the ascertainment of a basis for assessing damages. We may well surmise, and it is doubtless true, that the class of patrons the Kenilworth Inn was designed to entertain and accommodate would be positively deterred from going there if made acquainted with the use of the building during the war; nevertheless, it was in the beginning the voluntary act of the plaintiff company itself which changed the character of the inn, at least temporarily, from a hotel building to a Government hospital. The Government did not commandeer it, and so far as this record discloses, did not seek the lease. Need we augment this observation with the obvious fact that such a lease, irrespective of its restrictive terms and conditions, known alone to the parties thereto, was sufficient in Asheville to jeopardize the reputation of the inn as a [fol. 48] high-class tourist resort? The witnesses in the record testifying as to damages fix the amount upon the damages incident to a well known and distinct lease of premises for a tubercular hospital, without considering that the lease of a hotel for a Government hospital during the war or any other time, is ipso facto suf-

ficient to induce a prospective guest to seek accomodations in another hotel never so used. To what extent the receipt and treatment of a limited number of tubercular patients might increase the damages is not demonstrated. The hypothesis upon which the proof proceeds is the assertion of the fact that a hotel converted into a tubercular hospital is practically destroyed as a hotel for years thereafter, without considering the proposition that a conversion of the property by the voluntary act of the owners into a hospital of any character would necessarily encounter a reputation, at least to some extent, injurious to the same as a high-class inn, when it again comes into open competition with others not so used. So that it seems to us that the mere fact of housing tubercular patients and others with like obnoxious diseases, was not altogether the direct and proximate cause of the damages suffered, especially so when the express terms of the lease conceded their admission for a particular purpose.

Tubercular and all other patients, irrespective of their affliction, were to be received in surgical cases. While their continuance in the hospital may have been temporary, may we conclude that knowledge of their reception, even for this single purpose, was not sufficient in Asheville, where the situation in this respect is decidedly acute, to work a measure of injury to the reputation of the inn? In addition to this, the situation becomes more confused by the fact that the inn itself had never been opened to the public as a hotel, and had never been operated as such. No guests had registered and none invited until long after the expiration of this particular lease. Manifestly, without some evidence of the success of the enterprise, and some basis upon which to rest a judgment as to impairment of income, it would be no more than mere speculation to hold that the property in question would have been a profit-yielding venture. The defendant did not prevent the company from resuming the enterprise as a hotel proposition upon the expiration of the lease complained of. The plaintiff company, on the contrary, voluntarily entered into two additional leases, extending the use of the building as a hospital, and submitted to the elimination therefrom of the very restrictive clause of which it now complains, and thereafter tubercular patients were received therein and treated for the disease. Up until December 31, 1922 the inn was continuously used and occupied by the Government as a hospital. If, then, the plaintiff company, for a period of practically five years, demised its premises for use as a hospital, part of the time with a limited restrictive clause, and for much the greater portion of the time without any restriction, how may we estimate with any degree of certainty an alleged damage to its reputation or use as an inn, when, as a matter of fact, it had never attained any reputation or been used as such?

The company had no more than a pretentious building, inviting surroundings, and possibly a successful future. The value of its use as an inn was in the making. No clearer demonstration of this need be cited than the fact that the company itself granted an option of purchase for $888,000, a sum but little in excess of what

it now demands as damages. That there may be a recoverable in-[fol. 49] jury to the reversion by a tenant in possession under a written lease is, of course, not controverted, but the present difficulty has to do with the measure of damages, nothing else.

The plaintiff uses the building as an inn, guests have been received and entertained, and there is nothing in the record to show that any have departed or others failed to come because of the previous use of the building as a hospital. As a matter of fact the plaintiff opened the inn on March 10, 1923, some three months after resuming possession of the same, and between that date and the 16th of the same month entertained a daily average of 90 people, there being 194 guests at one time quartered in the inn. In the following month of April the North Carolina Medical Society was entertained at the inn, a notable incident, there being as high as 180 guests, probably doctors, registered in one day. While this was below the full capacity of the inn, it is of probative value in disclosing a lack of the existence of a discreditable force, sufficient in extent to publicly condemn the inn for use as such. Indeed, it is not in anywise a discouraging showing for the beginning of the enterprise.

Of still greater significance, however, is the apparently indisputable fact that the defendant did not violate the lease. When the plaintiff sought to induce the defendant to lease the inn the restrictive clause proposed would have precluded the use of the same for the treating or housing of tubercular patients except in surgical cases. This clause, "that no part of the property shall be used for the purpose of treating or housing any person suffering from tuberculosis in any form, or from smallpox or any other like contagious or obnoxious disease," was, indeed, highly restrictive. Under its terms the excepted patients were excluded. The defendant was unwilling to assent to the restriction. It was known—experience had so demonstrated—that a patient might possibly obtain admission to the hospital apparently free from the excepted diseases and subsequently develop one of the banned afflictions. In order to meet this emergency, and at the same time recognize as far as possible the desire of the plaintiff in this respect, the defendant changed this stipulation so as to read "that no part of the property shall be used for the purpose of receiving for treatment any person suffering," etc. The plaintiff, as before observed, agreed to the substitution. Therefore, the obligation arising out of this most significant clause extended no further than its express terms, not to receive for treatment patients falling without the restricted class. What do the words "receiving for treatment" mean? It is not asserted that they import absolute exclusion. Their ordinary and usual meaning indicate a clear intent to impose upon the defendant the positive obligation to refrain from knowingly receiving a patient within the restricted class and thereafter treating him for the disease. In other words, in so far as it was possible, by every known medical means, the defendant would not receive for treatment a patient known at the time to fall within the restriction.

Manifestly, though such a patient might be received temporarily he could not be immediately and ruthlessly cast aside, and if immediately thereafter he was *transferred* to a regular tubercular hospital for treatment, no promises were broken. As a matter of fact, that is precisely what happened. Of a total number of 119 [fol. 50] patients on whose cards the word "tuberculosis" is written, 60 were found after observation and diagnosis to be free from the disease, some were received for operations, some were treated for concurrent diseases, and others were under observation. Not one of the total number was received or treated as a tubercular patient, and when tuberculosis developed in each instance, as soon as it was practicable the patient was transferred to a tubercular hospital. The record unmistakably discloses that it was the purpose of the authorities in charge of the hospital to observe this restriction to its fullest extent.

A venereal ward was maintained in the hospital and patients were treated for venereal diseases. The facts appear in Finding VI. Typhoid patients were received and treated, and this is set forth in Finding VII. The restrictive clause is limited to the reception for treatment of any person suffering from tuberculosis, smallpox or any like contagious or obnoxious disease. The expert medical testimony in the record removes these diseases from the category of "like contagious and obnoxious disease." Under the well-known rule of ejusdem generis they are not to be classified as germinating that degree of contagion and obnoxion inherently attached to tuberculosis and smallpox. In its popular sense a venereal disease is odious, but the parties to this demise were not so considering it. The premises demised were to be used as a hospital, an institution of disease, a scientific refuge for its treatment, and the plaintiff was intent on excluding tubercular patients, smallpox patients, and others of like affliction. Surely it was not within the contemplation of the parties that all contagious diseases should fall within the restriction. If so, under modern diagnosis and authority patients suffering from bad colds might be excluded.

Applying to this clause the ordinary rules of construction, it seems obvious that the intent of the parties was to limit the restriction to patients whose disease would fall within the scope of contagion and objection attached to tuberculosis and smallpox. The weight of expert testimony in the record establishes this fact that the diseases complained of are not to be classified as such. The degree of danger from contagion is incomparable and the diseases themselves, while loathsome and repulsive, are not obnoxious in the technical sense, nor to the same extent as tuberculosis and smallpox, which may spread by innocent contact and endanger an entire locality and its population.

The case, then, in whatever aspect it may be considered seems devoid of merit. The petition will be dismissed, and it is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge, and Campbell, Chief Justice, concur.

[fol. 51] VI. JUDGMENT—Jan. 21, 1924

At a Court of Claims held in the City of Washington on the Twenty-first day of January, A. D., 1924, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendant, and do order, adjudge and decree that the plaintiff, as aforesaid, is not entitled to recover and shall not recover any sum in this action of and from the United States; and that the petition herein be and the same hereby is dismissed: And it is further ordered and adjudged that the United States shall have and recover of and from the plaintiff, aforesaid, the sum of Thirty dollars and twenty-eight cents ($30.28) the cost of printing the record in this court, to be collected by the Clerk, as provided by law.

By the Court.

VII. HISTORY OF PROCEEDINGS AFTER JUDGMENT

On March 21, 1924, the plaintiff filed a motion to set aside judgment and to amend findings of fact.

On May 12, 1924, the Court filed an order overruling plaintiff's motion for a new trial.

On July 10, 1924, the plaintiff presented for filing, a motion for leave to file a second motion to amend findings of fact.

On July 12, 1924, the court entered the following order:

Order

The court having considered the motion presented for filing on July 10, 1924, on the part of the plaintiff asking leave to file a second motion to set aside the judgment or to amend the findings of fact announced January 21, 1924, it is now ordered that said motion be and the same is denied.

[fol. 52] VIII. PETITION FOR APPEAL—Filed Aug. 9, 1924

Claimant, showing to the court that on January 21, 1924 the Court rendered a judgment in this case, dismissing the petition; that under an extension allowed by the court claimant on April 28 following filed a motion for a new trial and amendment of the findings of fact, and that on May 12 following said motion was overruled by the court, and that the case involves more than three hundred thousand dollars ($300,000.00) *dollars*, hereby applies for an appeal to the United States Supreme Court from said judgment.

The Court is respectfully referred to a separate motion, in these premises, offered this day by claimant for filing.

Benj. Carter, Attorney for Claimant.

IX. Order Allowing Appeal

It is ordered by the Court this 13th day of October, 1924, that the plaintiff's application for appeal be and the same is allowed.

By the Court.

[fol. 53] In Court of Claims of the United States

[Title omitted]

Clerk's Certificate

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled case; of the argument and submission of case; of the findings of fact, conclusion of law and opinion of the court by Booth, J.; of the judgment of the court; of the proceedings after the entry of judgment; of the plaintiff's application for an appeal and of the order of the court allowing said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Twelfth day of November, A. D., 1924.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of the Court of Claims.)

Endorsed on cover: File No. 30,791. Court of Claims. Term No. 240. The Kenilworth Company, appellant, vs. The United States. Filed January 5th, 1925. File No. 30,791.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

THE KENILWORTH COMPANY, *Appellant*,
v.
THE UNITED STATES, *Appellee*
} No. 240

Appeal from the Court of Claims

Motion of Appellant for Remand to Court of Claims for Amendment of Findings of Fact.

Brief for Appellant on Its Appeal and on Motion for Remand to Court of Claims.

BENJAMIN CARTER,
Attorney for Claimant.

JUNIUS G. ADAMS,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

THE KENILWORTH COMPANY, *Appellant*,
v.
THE UNITED STATES, *Appellee*
} No. 240

Appeal from the Court of Claims

MOTION OF APPELLANT FOR REMAND TO THE COURT OF CLAIMS FOR THE PURPOSE OF ADDITIONS TO THE FINDINGS OF FACT.

Appellant shows to the Court that in the several matters set out below the findings of the Court of Claims contained in the record of the case now before this court are radically defective: (1) in that important facts are omitted, and (2) in that some of the statement of fact stated are not supported by any evi-

dence. Said defects can be cured, and the case presented on its true merits, if findings of fact are made and reported by the Court of Claims to this Court on said points, to-wit:

1. The full correspondence, or other negotiations, between the office of the Surgeon General of the Army and appellant which resulted in the changes in the proposed contract of lease which, in part, are indicated in paragraph IV of the present findings (Record pp. 2-4).

2. Whether or not patients received in said hospital for examination as to tuberculosis were retained and treated there, upon ascertainment that this disease existed, and treated for the same, and what protest or other representations, if any, in regard to any such cases were made by the local officer in charge to the Surgeon General's office at Washington or to any other officers of that bureau in charge of hospitals.

3. What other representations, if any, were made by the local officer in charge or other responsible officers of said hospital to the Surgeon General's office, or other branch of the War Department or other Department having authority, regarding the treatment or retention of tubercular patients in said hospital as repugnant to the lease contract?

4. What report or representation, if any, was made to the Secretary of War or other responsible officer of the War Department, by an officer, or officers, detailed to examine and report upon a proposed takeover by the Public Health Service from the Surgeon General of said hospital property, regarding the inhibition in the Surgeon General's contract of treatment of tubercular patients in the hospital?

5. What protests, if any, were made by appellant to the officers in charge of said hospital regarding tubercular patients housed and undergoing treatment therein and what replies were given by said officers?

6. Whether or not some patients were retained and treated in said hospital for the diseases named and inhibited in said contract concurrently with other diseases.

7. Whether or not, during the retention of tubercular patients in said hospital, said fact was generally known in and about the city of Asheville, and, if it was, what was its effect on the value of the property in the public estimation?

8. Whether or not, during the tenancy and use of said hospital by the Surgeon General, there were housed and treated therein for syphilis persons having that disease in its tertiary stage.

9. Whether or not patients housed and treated in said hospital for tuberculosis were so housed and treated until November 8, 1918, when the leasehold of the Medical Corps terminated?

10. Whether in the spring and summer of 1919, as compared with the same period in former years, the high-class hotels of Asheville other than the Kenilworth had a large and lucrative patronage.

11. Whether during the same season persons who had planned to stop at the Kenilworth hotel while in Asheville, heard, on arriving there, that tubercular patients had been housed and treated in that building and for this reason went to other hotels instead.

12. To what amount, if any, the sale value of the Kenilworth property, as of November 8, 1919, when

the tenancy of the Surgeon General terminated, was impaired by the housing and treatment therein of tubercular patients.

13. To what amount or amounts in fact, if any, were the rental value of the Kenilworth property impaired on November 8, 1919, and on January 1, 1923, by housing and treatment therein of tuberculosis.

14. What would have been the cost in 1920 or 1923 of reconstructing the Kenilworth hospital building so as to remove all causes of infection with tuberculosis or syphilis.

15. What length of time would have been consumed in such reconstruction?

16. What was the rental value, during the time commencing on January 1, 1920, and the time commencing on January 1, 1923, necessary for such reconstruction of said hotel as it was when the Surgeon General took the lease of the same?

17. In the estimate and report of the Army Claims Board, narrated in par. XII of the Findings of Fact (Rec. pp. 23, 24) relative to physical damages, what reason, if any, was given by said board for not considering any damage appellant might have suffered, through the treatment or housing of the classes of patients named, in the hospital?

To show the probability that matters here indicated can be proved there are attached hereto appendices, as below, in relation to the respective items named:

Appendix A—Item 1.
Appendix B—Items, 2, 3 and 4.
Appendix C—Items 6 and 8.
Appendix D—Item 17.

There was before the Court of Claims, free of contradiction, impeachment, or inconsistency of any kind, evidences upon each of the items of this motion, but the court did not consider the same and made no findings upon those matters.

There was no evidence that the Government's officers "refused to accept the restriction as proposed" (Opinion Rec. p. 38). The utmost that, in any fair sense, can be said in this connection is that they "objected" to the use of the words "of treating" in the restriction of the use of the building (Findings, par. II, Rec. p. 17). It is true that these officers suggested the substitute set out in the finding, but that is an imperfect statement of what occurred. If the change was a matter of entirely amicable agreement between the parties, and they had no thought that they really were changing the contract, appellant assumes that the court will deem this material and will desire to have in the findings the text of the correspondence referred to.

After the decision and judgment of the Court of Claims, and within the time fixed by the rules of that court, appellant moved for amendment by said court of the findings of fact in the particulars that are contained in this motion, but the court denied that motion entirely.

Appellant moves that this court remand the case to the Court of Claims with directions that it, upon the evidence now in its record and any other competent evidence that the parties may submit, make and report to this court findings on the several questions of fact stated herein.

In the expectation that the court will set this motion to be heard at the same time, and in connection with, the case presented by the existing record, the two will be discussed in a single brief.

BENJAMIN CARTER,
Attorney for Claimant.

Appendix A

The Framing of the Contract—Item 1 of Motion

HEADQUARTERS SOUTHEASTERN DEPARTMENT

OFFICE OF QUARTERMASTER

Charleston, S. C.,
January 12, 1918.

In Reply
Refer To
481 (O. Q. M.)
Kenilworth Company.

From: Department Quartermaster.

To: Kenilworth Company, Kenilworth, Asheville, N. C.

Subject: Kenilworth Inn, Kenilworth, Asheville, N. C.

1. This office is in receipt of your offer of Dec. 11, 1917, to lease Kenilworth Inn and the grounds thereof to the Government; also the authority to enter into a lease with you for this property.

2. Before entering into the lease it is necessary that your offer be restated, as certain of the terms contained therein are in conflict with certain laws and regulations governing the entering into leases by the Government; one regulation is that no lease can extend beyond the close of any fiscal year; that is all Government leases terminate on June 30, that date being the end of the fiscal year. Hence, the lease made now cannot extend beyond June 30, 1918; however, there is a provision in the lease giving the Government the right of renewal for an indefinite time, which in this instance will be one year after a treaty of peace is signed between the United States and Germany. A lease entered into at the termination of the lease beginning February 1st, 1918, and ending June 30, 1918,

would be for a year, and would terminate on June 30, 1918.

3. Section 3648 Revised Statutes prohibits the Government from making payments in advance for any services or the delivery of articles of any description; accordingly, you could not be paid the rent in advance. Therefore, you are asked to redraft paragraph four of your offer. However, it is understood from a letter from the Surgeon General of the Army, that the rental for the first year shall be $115,000. For your information the lease can be so made as to provide for monthly payments of the rent on the first of the month for the calendar month just passed. In view of this statement, and also that the lease entered into now cannot extend beyond June 30, 1918, you are asked to restate the terms of your offer contained in the introductory and fourth paragraphs.

4. You are further asked to furnish this office with six blue prints or sketches of the property showing the boundary line of the whole tract, giving the courses and distances naming the owner or owners; giving any buildings, land marks, water courses, roads or other permanent improvements; state, county, etc., and the name of the engineer, scale and date.

5. In addition, you are asked to give the name of the corporation and in what county it is located, and under the laws of what state it is incorporated—also the names of the President and Secretary, and six certificates of the resolution giving these officers—mentioning their names—the authority to sign for the corporation.

6. A prompt reply to this communication giving the information desired, and the blue prints and certificates requested, will enable this office to make an early completion of the lease.

By direction:

R. C. Gresham,
2nd Lieut. Q. M. Corps, N. A.,
Assistant to Quartermaster.

RCG/dnw

I, Fred C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter is a correct copy of a copy of a letter which is a part of a report from the War Department filed in said court December 7, 1923, in the case of the Kenilworth Company v. the United States No. C-762.

Given under my hand and seal of said court this 5th day of March, 1926.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Asheville, N. C.,
January 15, 1918.

Surgeon General,
United States Army,
Washington, D. C.

Sir:

In accordance with the directions of the Quartermaster of the Southeastern Department, we are restating our proposal to you of December 11, 1917, covering the leasing of the Kenilworth Inn and grounds to the Government, changing and amending it to conform with the regulations pointed out by the Quartermaster's Office:

The Kenilworth Company, a North Carolina corporation, hereby proposes to enter into a contract of lease with the Government of the United States, whereby this Company will lease and the Government agrees to take, for the term of time from February 1, 1918, to June 30, 1918, the property known and described as Kenilworth Inn, and grounds thereof, in the town of Kenilworth, near the City of Asheville; in the State of North Carolina, including approximately four acres of bottom land on the Swannanoa River, and west of Kenilworth Road, upon the following terms and conditions:

(1) This company shall at once complete the erection of Kenilworth Inn, in accordance with the plans and specifications which were heretofore submitted to

you, except that no partitions or dividing walls indicated in red on said plans shall be installed; it being understood that all heating equipment and lighting fixtures are to be installed in the building, but this Company shall not provide any furniture or operating equipment.

(2) The building and property are to be leased to the Government for the purpose of a convalescent hospital for disabled officers or soldiers, but it is especially understood, and the lease shall so provide that no part of the property shall be used for the purpose of treating or housing any person suffering from tuberculosis in any form, or from smallpox, or any other like contagious or obnoxious disease, provided, however, that this shall not apply to a person suffering from tuberculosis, housed temporarily in said premises for an operation or the like.

(3) It is understood and agreed, and the lease shall provide that the Government shall maintain all buildings, equipment and machinery in good condition and repair, and at the termination of the lease deliver the same up to this Company in as good condition and repair as when leased, usual wear and tear and Acts of God to be excepted.

(4) The Government shall pay to this Company, as rental for said property, the sum of One Hundred and Fifteen Thousand ($115,000) Dollars for the first year of the term of the lease, and Seventy-five Thousand ($75,000) Dollars for each and every additional year of the term; the rent to be paid monthly on the first day of each and every month during the term of the lease, covering the rent for the calendar month just passed.

(5) The term of the lease proposed to be executed shall commence on the first day of February, 1918, and end on the 30th day of June, 1918; but the Government shall have the right and privilege under the contract of renewing the lease from year to year, for and during the continuation of the present war with Germany, and for one year after a Treaty of Peace has been signed between the United States and the German

Government. It is desired, but not insisted upon by this Company, that the contract of lease contain a clause, while not binding the Government in specific terms, to continue the lease in force for the duration of the war and one year; but at the same time stating that this is the spirit or understanding between the contracting parties.

Respectfuly submitted,

THE KENILWORTH COMPANY,

By: .....,

President.

I, Fred C. Kleinsemidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter is a correct copy of a copy of a letter which is a part of a report from the War Department filed in said court December 7, 1923, in the case of the Kenilworth Company v. the United States No. 305-A.

Given under my hand and seal of said court this 7th day of March, 1926.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

HEADQUARTERS SOUTHEASTERN DEPARTMENT

OFFICE OF QUARTERMASTER

Charleston, S. C., January 17, 1918.

In reply
Refer to
481 (O. Q. M.)
Kenilworth Company.

From: Department Quartermaster.

To: Kenilworth Company, Kenilworth, Asheville, N. C.

Subject: Kenilworth Inn, Kenilworth, Asheville, N. C.

1. In reply to your letter 15th inst., and the offer therein to lease Kenilworth Inn and the grounds thereof to the Government for hospital purposes, this office requests you to restate paragraph 4 of the offer. This request is made in view of the fact that the lease entered into February 1, 1918, will expire June 30,

1918; and any statement covering amount to be paid for rental for "first year of the term of the lease" or "the first 12 months of the term of the said lease" would not be correct, for while the lease will contain a provision giving the right of renewal to one year after a treaty of peace is signed between the United States and Germany, yet the lease by law, will end on June 30, 1918, and a new lease will have to be entered into at that time to cover the period from July 1, 1918, to June 30, 1919, provided the Government desires to renew the lease.

2. Further, it is desired to change paragraph 2 of your offer so that it shall read, "the building and property are to be leased to the Government for the purpose of a convalescent hospital for disabled officers or soldiers, but it is especially understood, and the lease shall so provide, that no part of the property shall be used for the purpose of receiving for treatment any person suffering from tuberculosis in any form, or from smallpox, or any other like contagious or obnoxious disease, provided, however, that this shall not apply to a person suffering from tuberculosis, housed temporarily in said premises, for the purpose of a no operation or the like.

3. This office will appreciate your prompt reply in order that there may be no delay in executing the lease.

By direction:

R. C. GRESHAM,
2nd Lieut., Q. M. Corps, N. A.,
Asst. to Quartermaster.

RGC/DMW Recorded.

I, Fred C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter is a correct copy of a letter, which is a part of a report from the War Department filed in said court December 7, 1922, in the case of the Kenilworth Company v. the United States No. C-762.

Given under my hand and seal of said court this 5th day of March, 1926.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Asheville, N. C., Jan. 19th, 1918.

Refer to
481 (O. Q. M.)
Kenilworth Company.

From: The Kenilworth Company, Asheville, N. C.

To: Quartermaster, Southeastern Department.

Subject: Kenilworth Inn, Kenilworth, Asheville, N. C.

1. In obedience to your request contained in your letter of the 17th instant, we beg to re-state paragraph 2 of our proposal to the Surgeon General for the leasing of Kenilworth Inn, making the same to read as follows:

> "2. The building and property are to be leased to the Government for the purpose of a convalescent hospital for disabled officers and soldiers, but it is especially understood, and the lease shall so provide, that no part of the property shall be used for the purpose of receiving for treatment any person suffering from tuberculosis in any form, or from smallpox, or any other like contagious or obnoxious disease, provided, however, that this shall not apply to a person suffering from tuberculosis, housed temporarily in said premises, for the purpose of an operation or the like."

We also restate paragraph 4 of the proposal, making the same to read as follows:

> "4. The Government shall pay to this company for the use of said property a monthly rental of $9,583.33 for each month of the term thereof, and should the Government desire to renew said lease, it shall pay a monthly rental of $9,583.33 for the first seven months of said renewal term and a monthly rental of $6,250.00 for each month thereafter of said renewed term, the rent to be paid

monthly on the first day of each month covering the rerent for the calendar month just passed."

It is hoped that this will meet with your approval and that the lease can be executed without delay.

Very truly ours,

THE KENILWORTH COMPANY,

By:

President.

I, Fred C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter is a correct copy of a copy of a letter, which is a part of a report from the War Department filed in said court December 7, 1923, in the case of the Kenilworth Company v. the United States No. C-762.

Given under my hand and seal of said court this 5th day of March, 1926.

F. C. KLEINSCHMIDT,

Assistant Clerk Court of Claims.

Appendix B

Contemporaneous Interpretation of Contracts by Government Officers—Items 2, 3 and 4 of Motion.

(1) Surname, Bell; (2) Christian name, Thomas; (3) rank, Dis. officer, 1st Lt.; (4) Company ——; (5) Regiment or Staff Corps. Last served as M. C., U. S. A.; (6) Age, yrs., 31; (7) Race, W.; (8) Nativity, Ky.; (9) Service, yrs. ——; (10) Register No. 766.

(11) Date of Admission, Oct. 12, 1919.

(12) Source of Admission, A. R. 1473.

(13) Cause of Admission, under observation for tuberculosis, pulmonary. Hosp.

(14) In line of duty?—

(15) Complication, Seq., Etc., Nov. 12/18. Diagnosis changed to tuberculosis, pulmonary, acute, left, hydropneumothorax, right upper lobe, acute infiltration. TB found in sputum.

(16) Disposition, left hospital.

(17) Date of Disposition, June 17, 1919.

(18) Name of Hosiptal, Etc., U. S. A. Gen. Hosp. No. 12, Biltmore, N. C.

(19) Sent with report of S. & W. for month of June, 1919.

(20) From Same.

(21) T. M. S. 1st M. C. U. S. Army.

(22) Days of treatment in current case, current year.

Year 1919 In Quarters	In Hospital
January	31
February	28
March	31
April	30
May	31
June	16
July	..
August	..
September	..
October	..
November	..
December	..
Total	167

I, Fred C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter is a correct copy of a copy of a letter, which is a part of a report from the War Department filed in said court February 14, 1922, in the case of the Kenilworth Company v. the United States No. 305-A.

Given under my hand and seal of said court this 5th day of March, 1926.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

705. 1 Disposition of patients. Transfer of Dr. Bell.

January 23, 1919.

Commanding Officer.

Commanding Officer, U. S. A., General Hospital No. 19, Oteen, N. C.

Dr. Thomas C. Bell.

1. Dr. Thomas C. Bell, discharged from the Army on account of disability, now a patient at this hospital, has chronic pulmonary tuberculosis.

2. Due to the fact that patients suffering from tuberculosis are not to be treated at this hospital in conformity with agreement with lease executed between the owner of the buildings and the Government, this man will have to be discharged from hospital.

3. Information is requested as to whether or not he can be accompanied at your hospital. Dr. Bell is receiving compensation from the Bureau of War Risk Insurance and is entitled to treatment in a Government hospital.

4. An early reply will be appreciated.

JOHN B. MCCREARY,
Major, M. C., U. S. A.

JC/h.

1st Ind.

C. O., No. 19, General Hospital,
Oteen, N. C., Jan. 25th, 1919.

To the Surgeon General, U. S. A., atten. Colonel Roger Brooks,

1. Inviting attention of paragraph 3 of the above letter. In view of the fact that Dr. Bell is receiving compensation from Bureau of W. R. I., it is not believed that he is entitled to treatment in this hospital.

2. Request ruling in this case.

HENRY W. HOAGLAND,
Lieut. Col. Med. Corps., Commanding.

S. G. O. 210 Bell, Thomas. sjm/eec

2nd Ind.

War Department, S. G. O.,
January 19, 1919.

To Commanding Officer, General Hospital No. 19, Oteen, N. C.

1. Returned.

2. There is no authority for the admission of discharged officers or soldiers to any Army hospital for treatment.

By direction of the Surgeon General.

S. J. MORRIS,
Col. Med. Corps.

3rd Ind.

C. O., Gen. Hosp., No. 19,
Oteen, N. C., January 31, 1919.

To Commanding Officer, General Hospital No. 12, Biltmore, N. C.

1. Forwarded, inviting attention to 2nd Ind.

By order of Lieutenant Colonel Hoagland.

G. E. VASS,
Capt. S. C., U. S. A., Adjutant.

4th Ind.

S. G. O. 201 Bell, Thomas C. JC/h.
U. S. A. General Hospital No. 12,
Biltmore, N. C., February 2, 1919.

To the Surgeon General, U. S. Army, Washington, D. C.

1. Returned. It is requested that information be furnished relative to the interpretation of par. 3, section 302, act of Congress, approved October 6, 1917, as amended, and published in Bulletin No. 41, War Department, 1918, page 13.

2. If, under the provisions of the above, Dr. Bell is not entitled to treatment in an army hospital, it is requested that this office be informed as to what Government hospital he, or other discharged officers and enlisted men, who desire and are in need of hospital treatment, can be advised to apply for admission.

JOHN B. MCCREARY,
Major, M. C., U. S. A., Commanding.

705—Transfer Dr. Bell to G. H. at Albequerque.

10th Ind.

C. O., U. S. A., General Hospital No. 19.
Oteen, N. C., March 30, 1919.

To the Commanding Officer, General Hospital No. 12, Biltmore, N. C.

1. Forwarded for information and return of these papers as requested. In view of the 7th indorsement, it is presumed that it will be more convenient for all concerned if Dr. Bell proceeds directly from General Hospital No. 12 to Albuequerque rather than being transferred to General Hospital No. 19 prior to leaving for Albuquerque.

WM. LYSTER,
Colenel, M. C., U. S. A., Commanding.

11th Ind.

WL:LM

(S. G. O., 201 Bell, Thomas C.)

U. S. A. General Hospital No. 12,
Biltmore, N. C., April 1, 1919.

To the Commanding Officer, U. S. A., General Hospital No. 19, Oteen, N. C.

1. Returned. Contents noted. Dr. Bell will remain at this hospital until his transfer to Albuquerque, New Mexico.

JOHN B. MCCREARY,
Major, M. C., U. S. A., Commanding.

I, Fred C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter is a true copy of a copy of a letter with indorsements thereon, which is a part of a report from the War Department filed in said court February 14, 1922, in the case of the Kenilworth Company v. the United States No. 305-A.

Given under my hand and seal of said court this 5th day of March, 1926.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

War Department Claims Board
Appraisal Section
War Trade Board Building
Washington

WPM/rp

September 2, 1921.

From: War Department Claims Board, Appraisal Section, War Trade Bldg.
To: Public Health Service, Treasury Department.
Subject: Claim of the Kenilworth Company, Asheville, N. C.

1. There is pending before this board for determination the claim of the Kenilworth Company, owner of the Kenilworth Inn, North Carolina, for damages to property while under lease to the United States for hospital purposes, in the total sum of $158,721.32. The claim contains other items, but the amount above is alleged to be the cost of restoration of the premises to the same condition as when leased, this being an obligation on the part of the United States under the lease to the War Department and also the lease to the Treasury Department.

2. While it appears that the obligation on the part of the War Department to pay the cost of restoration, so far as such cost is attributable to the War Department, may have already accrued, it is practically impossible to make a definite ascertainment of the proper allocation of proportions of items between the

War Department and the Treasury Department without cooperative action on the part of both departments. It is also recognized that the Treasury Department would be in no way bound by whatever determination might be made by the War Department as to the cost of restoration or the allocation thereof.

3. By reason of a breach of contract by the United States, in that this property was used for tubercular and contagious patients in violation of the express terms of the lease to the War Department, the claimant is in serious financial difficulty because of inability to renew loans, and in fairness to the claimant it is believed that whatever sum has already accrued and is due from the War Department should be paid as soon as possible, without waiting for final vacation of the premises by the Public Health Service.

4. It is the opinion of this Board that the only practicable way to determine this matter is by joint action of this Board and the proper department of the Public Health Service to determine the total amount due claimant under the restoration clauses of the leases and the proportion of such total that should be allocated to the War Department and the Treasury Department.

5. It is, therefore, requested that action along the lines above indicated be taken.

WAR DEEPARTMENT CLAIMS BOARD,
APPRAISAL SECTION.

By (Signed) W. P. MONTGOMERY,
Captain, J. A. G. D.

I, F. C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter is a correct copy of a copy of a letter, which is a part of a report of the Comptroller General filed in said Court December 7, 1923, in the case of the Kenilworth Company v. the United States No. C-762.

Given under my hand and seal of said court this 5th day of March, 1925.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

WGS/GRH

August 20, 1919.

The Director of Operations, U. S. A.,
Office of the Chief of Staff,
War Department,
Washington, D. C.

Sir:

Owing to the large number of discharged soldiers suffering from *tuberculosis* who are applying to this Service for relief, serious consideration is being given to the question of asking the Army to transfer the lease of U. S. General Hospital No. 12, Biltmore, N. C., to this Service when it is released by the Army. This Bureau is now in communication with the owners to ascertan if the owners will permit the use of this hospital for tuberculosis patients. An answer is expected the latter part of this week and as soon as it is received the question of asking for this transfer will be decided and you will be immediately advised. Will you kindly issue instructions that this hospital be not dismantled until it is ascertained whether or not this Service can use it for the care and treatment of discharged soldiers suffering from tuberculosis.

Respectfully,

J. C. Perry,
Acting Surgeon General.

Memo

In view of the fact that renewal of the present Army lease would not give the Service the privilege of treating tubercular patients, and that a new lease based on five year occupancy with the privilege of buying will permit the treatment of any class of patients of the Service, it is requested that a five-year lease be executed, carrying the general provisions contained in the lease obtained for the Mt. Alto property in Washington, with a stipulation as to the value at which the property may be purchased, and embodying the credit of $25,000 per annum towards the purchase price, as outlined in telegram from the President of the Kenilworth Company, dated August 31, 1919.

I, Fred C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter is a true copy of a copy of a letter with "memo" attached thereto, which is a part of a report from the War Department filed in said court December 7, 1923, in the case of the Kenilworth Company v. the United States No. C-762.

Given under my hand and seal of said court this 5th day of March, 1926.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Appendix C

Card Records of Patients in Hospital—
Items 6 and 8 of Motion

REPORT

1821009. (1) Surname, Largen; (2) Christian Name, William C.; (3) Rank, Pvt.; (4) Company, D; (5) Regiment or Staff Corps, 318 Inf.; (6) Age, Yrs., 25; (7) Race, W.; (8) Nativity, Va.; (9) Service, Yrs., 10/12; (10) Register No. 361; (11) Date of Admission, July 22, 1918; (12) Source of Admission, Base Hosp., Camp Lee, Va., Admission, May 2/18, Reg. No. 3048; (13) Cause of Admission, For convalescence following Pleurisy, sero-fibrinous, acute, tuberculosis, right, at Base Hospital, Camp Lee, Va., May, June, and July, 1918. (a) Hosp. (14) In Line of Duty? Yes; (15) Complication, Sec., Etc. (16) Disposition, Transferred to U. S. A. Gen. Hosp. No. 19, Azalea, N. C.; (17) Date of Disposition, Oct. 6, 1918; (18) Name of Hospital, Etc., U. S. A. General Hospital No. 12, Biltmore, N. C.; (19) Sent with Report of S. & W. for Month of Oct., 1918; (20) From Same; (21) D. R. C., Capt. M. G., U. S. Army.

Classification:

(22) No. — of Disposition.
(23) No. — of Admission.
(24) Sub. No. —.
(25) Sub. No. —.

(26) Days of Treatment in Current Case, Current Year:

Year 1918	In Quarters	In Hospital
January		..
February		..
March		..
April		..
May		..
June		..
July		10

August	31
September	30
October	5
November	..
December	..
Total	96

(a) Corrected entry (Pleurisy, sero-fibrinous, acute, right. Changed to read Pleurisy, sero-fibrinous acute, tuberculosis, right.

I, Fred C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter, is a correct copy of a copy of a card record, which is a part of a report from the War Department filed in said court February 14, 1922, in the case of the Kenilworth Company v. The United States No. 305-A.

Given under my hand and seal of said court this 5th day of March, 1926.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

---

(1) Surname, Wright; (2) Christian Name, Crispin; (3) Rank, 1st Lt.; (4) Company, —; (5) Regiment or Staff Corps, M. C. U. S. A.; (6) Age, Yrs., 36; (7) Race, W.; (8) Nativity, Va.; (9) Service, Yrs., 1 2/12; (10) Register No. 696.

(11) Date of Admission, Sept. 11, 1918.

(12) Source of Admission, U. S. A. Gen. Hosp. No. 18, Waynesville, N. C. No. T. C. received.

(13) Cause of Admission.—Tuberculosis, pulmonary, chronic, active, left upper lobe. Hosp.

(14) In line of duty? Yes.

(15) Complication, Sec., Etc. (1) Tuberculosis of kidney, left, LD. Yes. (2) Tuberculosis of bladder, ulcerative. LD. Yes.

(16) Disposition. Transferred to Gen. Hosp. No. 19 U. S. A. Azalea, N. C.

(17) Date of disposition. Nov. 4, 1918.

(18) Name of Hospital, Etc. U. S. Gen. Hosp. No. 12, Biltmore, N. C.

(19) Sent with report of S. W. for month of Nov. 1918.

(20) From same.

(21) D. R. Childs, Capt. M. C., U. S. Army.

(22) Days of treatment in current case, current year:

Year 1918	In Quarters	In Hospital
	September	20
	October	31
	November	3
	Total	54

I, Fred C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter is a correct copy of a copy of a card received, which is a part of a report from the War Department filed in said court February 14, 1922, in the case of the Kenilworth Company v. the United States No. 305-A.

Given under my hand and seal of said court this 5th day of March, 1926.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

A. S. No. 1554351

(1) Surname, King; (2) Christian Name, Ol; (3) Rank, Private; (4) Company, M; (5) Regiment or Staff Corps, 7th Inf.; (6) Age, Yrs., 25; (7) Race, W; (8) Nativity, Tenn.; (9) Service, Yrs., 1 6/12; (10) Register No. 1645-2060; (11) Date of Admission, May 13, 1919; (12) Source of Admission, Furlough. Proper Station, A. E. F.; (13) Cause of Admission, (Old) Bronchitis, Chronic, catarrhal, bilateral, following inhalation of gas received while with A. E. F. at Chateau Thierry, France, July 14/18; Hosp.

(14) In Line of Duty? Yes.
(15) Complication, Seq., Etc., May 29/19. Add. Diag. Tuberculosis, pulmonary, right upper lobe, TB found in sputum. In LD.
(16) Disposition. Trans. to Gen. Hosp. No. 19, Oteen, N. C.
(17) Date of Disposition. June 12, 1919.
(18) Name of Hospital, Etc. U. S. A. General Hospital No. 12, Biltmore, N. C.
(19) Sent with report of S. & W. for month of June, 1919.
(20) From Same.
(21) T. M. S. 1st Lt. M. C. U. S. Army.
(22) Days of Treatment in Current Case, Current Year:

Year 1919	In Quarters	In Hospital
January		..
February		..
March		..
April		..
May		19
June		11
July		..
August		..
September		..
October		..
November		..
December		..
Total		30

I, Fred C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter, is a correct copy of a copy of a card record, which is a part of a report from the War Department filed in said court February 14, 1922, in the case of the Kenilworth Company v. The United States No. 305-A.

Given under my hand and seal of said court this 5th day of March, 1926.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

1825069. (1) Surname, Ferree; (2) Christian Name, Marshall J.; (3) Rank, Pvt.; (4) Company, C; (5) Regiment or Staff Corps, 319th Inf.; (6) Age, Yrs., 31; (7) Race, W; (8) Nativity, Pa.; (9) Service, Yrs., 4/12; (10) Register No. 112; (11) Date of Admission, June 22, 1918; (12) Source of Admission, Base Hosp. Camp Lee, Va. Orig. Adm. Mar. 16/18, Reg. No. 6080; (13) Cause of Admission. 1. (Old) Laryngitis, chronic. Existed prior to active service. 2. (Old) Tuberculosis, pulmonary, chronic left upper lobe. 3. (Old) Fibrosis, left upper lobe of lung. Result of bullet wound received. (a) (14) In Line of Duty? 1 No, 2 No. 3 No, 4 Yes, 5 Yes; (15) Complication, Seq. Etc., July 26/18 Resection of 4th rib, right with incision and drainage of lung abscess, in LD N20, 0, ether date of onset March 15, 1918. (16) Disposition, Furlough cure not complete; (17) Date of Disposition, December 4, 1918; (18) Name of Hospital, Etc., U. S. A. General Hospital No. 12, Biltmore, N. C.; (19) Sent with Report of S. & W. for Month of December 1918; (20) from Same; (21) F. J. W. Major M. C. U. S. Army.

Classification:

(22) No. — of Disposition.
(23) No. — of Admission.
(24) Sub. No. —.
(25) Sub. No. —.

(26) Days of Treatment in Current Case, Current Year:

Year 1918	In Quarters	In Hospital
January	..	..
February	..	..
March	..	..
April	..	..
May	..	..
June	..	9
July	..	31
August	..	31
September	..	30
October	..	31

November	30
December	4
Total	166

(a) Prior to active service.

4. (Old) Pleurisy, suppurative, right.

5. (Old) Wound unhealed following operation for pleurisy, suppurative, right at Camp Lee, Va. (No date nor record of operation given on TC) Bronchopneumonia as on TC cured on admission to this hospital.

I, Fred C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter, is a correct copy of a copy of a card record, which is a part of a report from the War Department filed in said court February 14, 1922, in the case of the Kenilworth Company v. The United States No. 305-A.

Given under my hand and seal of said court this 5th day of March, 1926.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

A. S. No. 807509.

(1) Surname, Scott; (2) Christian Name, Frank R.; (3) Rank, Pvt.; (4) Company, A. C. No. 42; (5) Regiment or Staff Corps, Med. Dept. U. S. A.; (6) Age, Yrs., 32; (7) Race, W; (8) Nativity, Mich.; (9) Service, Yrs, 10/12; (10) Register No. 1308.

(11) Date of Admission. January 22, 1919.

(12) Source of Admission. G. H. No. 14, Ft. Oglethorpe, Ga. Adm. Apr. 29/18. Reg. No. 15665 (a).

(13) Cause of Admission. 1. (Old) Abscess, psoas, bilateral, chronic, cause undetermined. (a) 2. Convalescing from operation and drainage of: abscess, psoas, left, chronic, at G. H. No. 14, Ft. Oglethorpe, Ga. Aug. 7/18. 3. Tuberculosis, bone, chronic, involving 4th and 5th lumbar vertebrae and sacrum (c). Hosp.

(14) In line of duty? 1 Yes, 2 Yes, 3 Yes, 4 Yes, 5 Yes.

(15) Complication, Seq., Etc. May 22/19. Diagnosis No. 3, changed to Caries of the 3rd and lumbar vertebrae, tubercular. In LD.

(16) Disposition. Died. Cause of death: Psoas abcess, amyloid disease and caries of the 3rd and 4th lumbar (d).

(17) Date of Disposition. May 22, 1919.

(18) Name of Hospital, Etc. U. S. A. General Hospital No. 12, Biltmore, N. C.

(19) Sent with report of S. & W. for month of May, 1919.

(20) From Same.

(21) J. A. B. 1st Lt. M. C. U. S. Army.

(22) Days of treatment in current case, current year:

Year 1919	In Quarters	In Hospital
January		10
February		28
March		31
April		30
May		22
Total		121

(a) Orig. Adm. Inf. Motorized F. H. Camp Greenleaf, Ga.

(b) Corrected entry: Location of abscess changed from "left" to "bilateral."

I, Fred C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter, is a correct copy of a copy of a card record, which is a part of a report from the War Department filed in said court February 14, 1922, in the case of the Kenilworth Company v. The United States No. 305-A.

Given under my hand and seal of said court this 5th day of March, 1926.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

1871963. (1) Surname, McCutchen; (2) Christian Name, Willie, (3) Rank Pvt.; (4) Company C; (5) Regiment or Staff Corps 528 Lbr. Bn.; (6) Age, Yrs. 30; (7) Race C.; (8) Nativity, S. C.; (9) Service, Yrs. 5/12; (10) Register No. 369; (11) Date of Admission, July 27, 1918; (12) Source of Admission, Infirmary, Pisgah Forest Adm. July 23/18; Reg. No. 41; (13) Cause of Admission, 1, Syphilis, tertiary, manifested by positive Wasserman. 2, Lumbar pains, due to post-operative adhesions—kidney operation performed Aug. 3/17 at John Hopkins Hosp., Baltimore, Md. (Patient's statement.) 3, Hernia, ventral, small, post-operative Hosp. (a) (14) In Line of Duty? 1, No, 2, No, 3, No. (15) Complication, Seq., Etc., Dec. 7/18, Add. Diag. Ulcer and necrosis of anterior surface, elbow, right, following salvarsan intravenous injection 2½ mo. ago at Gen. Hosp. No. 12, Biltmore, N. C. Not LD. Dec. 7/18, Operation; Skin-plastic (c). (16) Disposition. Dscharged from service by reason of discharge of Organization. Condition on discharge: (b) (17) Date of Disposition Feb. 21, 1919; (18) Name of Hospital, Etc., U. S. A. General Hospital No. 12, Biltmore, N. C. (19) Sent with Report of S. & W. for month of February, 1919. (20) From Same. (21) T. M. S. 1st Lt., M. C., U. S. Army.

Classification:

(22) No. Of Disposition.
(23) No.—Of Admission.
(24) Sub. No.
(25) Sub. No.

(26) Days of Treatment in Current Case Current Year.

Year 1919	In Quarters	In Hospital
January		31
February		21
March		..
April		..
May		..
June		..
July, 1918		5

August	31
September	30
October	31
November	30
December	31
Total	210

(a) In apppendix scar from operation performed Aug. 3/17 at Johns Hopkins Hosp., Baltimore, Md. (According to patient's statement.) TCD not concurred in.

(c) And skin-graft, anterior surface, right elbow. An: Ether, Int.: 2½ Mo. since injection of salvarsan. Not LD.

(b) Clinically cured.

I, F. C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter is a correct copy of a copy of a card record, which is a part of a report from the War Department filed in said court February 14, 1922, in the case of the Kenilworth Company v. the United States No. 305-A.

Given under my hand and seal of said court this 5th day of March, 1926.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

107146 (c) (1) Surname, Grffin; (2) Christian Name, Elder; (3) Rank, Pvt.; (4) Company B; (5) Regiment or Staff Corps, 369 Inf.; (6) Age, Yrs. 22; (7) Race C.; (8) Nativity, Va.; (9) Service, Yrs. 1-2/12; (10) Register No. 399; (11) Date of Admission, Aug. 1, 1918; (12) Source of Admission, Embk. Hosp. Newport News, Va.; Adm. July 20/18, Reg. No. 12637 (a) (13) Cause of Admission, 1. (Old) Anthritis, chronic, involving both hips and knees—cause unknown. 2. (Old) Syphilis, tertiary, manifested by skin lesions, scars of leg ulcers, roughened tibiel crests, and history. Wasserman, positive. (b) Hosp. (14) In Line of Duty? 1. Yes; 2. No; (15) Complication, Sec., Etc. (16)

Disposition. Discharged on C. of D. on acct. of Arthritis, chronic as under 13. Deg. of Dis. ¼; (17) Date of Disposition, Feb. 6, 1919; (18) Name of Hospital, Etc., U. S. A. Gen. Hosp. No. 12, Biltmore, N. C.; (19) Sent with Report of S. & W. for Month of Feb., 1919; (20) From Same; (21) T. M. S. 1st Lt., M. C., U. S. Army.

Classification:

(22) No. — of Disposition.
(23) No. — of Admission.
(24) Sub. No. —.
(25) Sub. No. —.

(26) Days of Treatment in Current Case Current Year.

Year 1919	In Quarters	In Hospital
January		31
February		6
March		..
April		..
May		..
June		..
July		..
August, 1918		31
September		30
October		31
November		30
December		31
Total		190

(a) Orig. Adm. Base Hosp. No. 8, AEF, July 8, 1918. Reg. No. not given.

(b) Corrected entry. Report of Wasserman added.

(3) Correct Serial Number as from SR.

I, Fred C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter, is a correct copy of a copy of a card record, which is a part of a report from the War Department

filed in said court February 14, 1922, in the case of the Kenilworth Company v. The United States No. 305-A.

Given under my hand and seal of said court this 5th day of March, 1926.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

---

(1) Surname, Gutte; (2) Christian Name, Karl; (3) Rank ——; (4) Company ——; (5) Regiment or Staff Corps, Interned Alien Enemy; (6) Age, Yrs. 34; (7) Race, W.; (8) Nativity, Germany; (9) Service, Yrs. ——; (10) Register No. 507; (11) Date of Admission, August 13, 1918; (12) Source of Admission, U. S. Int. Stn. Inf. Hot Springs, N. C. Adm. Aug. 1/18. Reg. No. 106; (13) Cause of Admission, 1. (Old) Typhoid fever; 2. Bed-sores. 1st dose typhoid prophlaxis administered about Aug. 1/18, patient's statement. Hosp.; (14) In Line of Duty? (15) Complication, Seq., Etc., Nov. 7/18, Add. Diag. Syphilis, tertiary, (Wassermann neg.afte r 6 salvarsans) Jan. 12/19 Add. Diag. Influenza, Cured Jan. 22, 1919. (16) Disposition, Left Hospital, sent to W. P. B., Ft. Oglethorpe, Ga.; (17) Date of Disposition, Feb. 7, 1919; (18) Name of hospital, Etc.; U. S. A. General Hospital No. 12, Biltmore, N. C.

(19) Sent with Report of S. & W. for month of , 19 .

(20) From Same.

(21) T. M. S. 1st Lt., M. C., U. S. Army.

Classification:

(22) No. — of Disposition.
(23) No. — of Admission.
(24) Sub. No. —.
(25) Sub. No. —.

(26) Days of Treatment in Current Case, Current Year.

Year 1919	In Quarters	In Hospital
January		31
February		7
March		..
April		..
May		..
June		..
July		..
August		19
September		30
October		31
November		30
December		31
Total		179

I, Fred C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter, is a correct copy of a copy of a card record, which is a part of a report from the War Department filed in said court February 14, 1922, in the case of the Kenilworth Company v. The United States No. 305-A.

Given under my hand and seal of said court this 5th day of March, 1926.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Correction Card No. 1885989.

(1) Surname Littlejohn; (2) Christian Name, Worth; (3) Rank Pvt.; (4) Company C; (5) Regiment or Staff Corps, 444 Res. Lbr. Bn.; (6) Age, Yrs. 24; (7) Race, C.; Nativity, S. C.; (9) Service, Yrs. 8/12; (10) Register No. 889; (11) Date of Admission Nov. 18, 1918; (12) Source of Admission, Infmry, Pisgah Forest, N. C.; Adm. Nov. 18/18; No. Reg., No. unknown; (13) Cause of Admission, 1. Nephritis, chronic, parenchymatous; 2, Syphilis, tertriary, manifested by scar on penis and positive Wassermann (both existed prior to active service) Hosp.; (14) In Line of Duty? 1, No. 2, No. (a) (15) Complication, Seq., Etc., ———; (16) Disposition, Furlough; cure notcomplete; (17) Date of Disposition, March 30,

1919; (18) Name of Hospital, Etc., U. S. A. Gen. Hosp. No. 12, Biltmore, N. C.; (19), Sent with Report of S. & W. for Month of Mar., 1919; (20) From Same; (21) John B. McCreary, Major, M. C., U. S. Army.

(22) Days of Treatment in Current Case, Current Year.

Year 1919	In Quarters	In Hospital
January		31
February		28
March		30
April		..
May		..
June		..
July		..
August		..
September		..
October		..
November, 1918		13
December		31
Total		133

Corrected entry:

(a) Line of duty erroneously reported on report card of March, 1919.

(Correction Card.)

(Letter date of)

4-17-19.)

I, Fred C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter, is a correct copy of a copy of a card record, which is a part of a report from the War Department filed in said court February 14, 1922, in the case of the Kenilworth Company v. The United States No. 305-A.

Given under my hand and seal of said court this 5th day of March, 1926.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

A. S. No.

(1) Surname, Gallrein; (2) Christian Name, Ernest; (3) Rank; (4) Company, interned; (5) Regiment or Staff Corps, Alien Enemy; (6) Age, Yrs. 53; (7) Race, W.; (8) Nativity, Germany; (9) Service, Yrs.; (10) Register No. 328; (11) Date of Admission, July 15, 1918; (12) Source of Admission, Merriweather Hosp., Asheville, N. C.

(13) Cause of Admission, 1. Syphilis, tertiary, aneurism, ascending aorta, Wassermann one plus; 2. Endocarditis, chronic, syphilitic, aortic regurgation. Hosp.

(14) In Line of Duty?

(15) Complication, Seq., Etc.

(16) Disposition, Left Hosp. (delivered to Dep. U. S. Marshal, Asheville, N. C.)

(17) Date of Disposition, November 15, 1918.

(18) Name of Hospital, Etc., U. S. A. General Hospital No. 12, Biltmore, N. C.

(19) Sent with Report of S. W. for month of Nov., 1918.

(20) From Same.

(21) D. R. C. Capt. Mc., U. S. Army.

(22) Days of Treatment in Current case, Current Year.

Year 1918	In Quarters	In Hospital
January	.....	.....
February	.....	..
March	.....	..
April	.....	..
May	.....	..
June	.....	..
July	.....	17
August	.....	31
September	.....	30
October	.....	31
November	.....	14
December	.....	..
Total	.....	123

I, Fred C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter is a true copy of a copy of a letter which is a part of a report from the War Department filed in said court February 14, 1922, in the case of the Kenilworth Company v. the United States No. 305-A.

Given under my hand and seal of said court this 5th day of March, 1926.

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Appendix D

Claims Board's Disclaimer of Jurisdiction

153-FC-7 (Kenilworth Co.)

OFFICE OF THE CHIEF OF FINANCE

Washington, D. C., November 1, 1921.

To: General Accounting Office, War Dept. Division, Washington, D. C.

1. Forwarded herewith is claim of Kenilworth Company, Asheville, N. C., for restoration of building, $158,721.32 and damage to property through violation of lease, $500,000.

2. The War Department Claims Board has recommended that the claim for restoration of building be approved for $81,066.82, of which $10,707.28 is payable by the Public Health Service and $70,359.54 by the War Department. The Board disclaims jurisdiction over the item of $500,000.

3. Some of the items of charge appear to be high, but claimant has verbally stated that the fittings and material were high class and expensive, such as would be expected in a hotel of the first class.

4. Correspondence herewith indicates that it was the intention of the contracting parties in making restoration to place the building in condition for hotel purposes, but the lease provides only for the maintenance of buildings, equipment and machinery in good condition and repar and for delivery of same at the expiration of the lease in as good condition and repair as when leased, usual wear and tear and acts of God excepted.

5. As the damages are not set forth in the contract of lease and are subject to review and adjustment in your office the complete file is forwarded recommend-

ing direct settlement. Acceptance of claimant in said amount of $70,359.54 is herewith.

H. M. Lord,
Chief of Finance, U. S. S.,

Encls: File.

By: H. S. Gott,
Chief, Claims Division.

I, F. C. Kleinschmidt, Assistant Clerk of the Court of Claims, hereby certify that the foregoing matter is a correct copy of a copy of a letter, which is a part of a report of the Comptroller General filed in said court December 7, 1923, in the case of the Kenilworth Company v. the United States No. C-762.

Given under my hand and seal of said court this 5th day of March, 1925.

F. C. Kleinschmidt,
Assistant Clerk Court of Claims.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

THE KENILWORTH COMPANY, *Appellant*,
v.
THE UNITED STATES, *Appellee*
} No. 240

Appeal from the Court of Claims

Brief for Appellant on Its Appeal and on Motion for Remand to Court of Claims.

BENJAMIN CARTER,
Attorney for Claimant.

JUNIUS G. ADAMS,
Of Counsel.

CASES CITED

United States v. Bostwick, 94 U. S. 53..... 7
Delano v. Smith, 206 Mass. 365..... 7
Hersey v. Chapin, *et als.*, 162 Mass. 176..... 7
Higgins v. Los Angeles Gas & Electric Co., 159 Calif. 651.....8, 9
Cooper v. Kankakee Electric Light Co., 164 Ill. App. 581 8
Donk Bros. Coal & Coke Co. v. Novero, 135 Ill. App. 633 8
Adams & Sullivan v. Seugel, 177 Ky. 535..... 8
Toebbe v. City of Covington, 145 Ky. 763..... 8, 9
C., N. O. & T. P. Ry. Co. v. Falconer (Ky. unofficial), 97 S. W. 729..... 8, 9
Wiggins v. St. L., M. & S. E. Ry. Co., 119 Mo. App. 8
Slavin v. State, 152 N. Y. 45..... 8
Bigbee Fertilizer Co. v. Scott, 3 Ala. 333..... 8, 9
Roach v. Blair, 190 Mich. 11..... 8
Barrick v. Schifferdecker, 132 N. Y. 52..... 8
Graessle v. Carpenter, 70 Ia. 116..... 8
McGregor v. Board of Education, 101 N. Y..... 10

IN THE

Supreme Court of the United States

THE KENILWORTH COMPANY

v.

THE UNITED STATES

No. 240

BRIEF

Appellant believes that upon examining its motion for a remand to the Court of Claims for the purpose of amplifying the findings the court will recognize that this goes deep into the merits of the cases, and therefore that it would be unprofitable to hear argument upon the present record alone. This brief, therefore, will treat both of the record and of the motion for a remand.

The appeal brings before the court a second Court of Claims suit of the Kenilworth Company growing out of damage done to property, during a lease to the War Department in 1918 and 1919, by the housing and treatment, in violation of express contract, of patients suffering with tuberculosis, syphilis, or other contagious and offensive diseases; the first case having been dimissed without prejudice on June 18, 1923. The Public Health Service succeeded the War Depart-

ment in possession and use of the property, taking a separate lease in November, 1919, and turned it back to claimant as of January 1, 1923. In the former case there was superabundant proof on both sides. Among the facts to which claimant's President and Manager, Mr. J. M. Childes, testified were that, in sight of this repossession of the property, he had tried diligently to rent it for a hotel or hospital, or any proper use whatever, but had not been able to obtain a single offer; and that the company's only recourse would be to inaugurate and operate a hotel itself at an inevitable and heavy loss of money long enough for the property to live down its reputation as a tubercular hospital. When this first case was called for hearing, on June 12, 1923, claimant's chief attorney stated that the company had in fact opened the hotel and that the expense to date had far outrun the receipts. The court there interposed, suggesting that the claim would have a more satisfactory aspect if this were of record, and therefore that the suit would better be dismissed, a new one instituted and proof made of the fact stated, to be used with the record already presented. That suggestion was followed by counsel; the present suit being instituted on June 20 following.

The injury to the property occurred under a contract of date January 21, 1918, with the Surgeon General of the Army, and renewals thereof, which were to run to June 30, 1920, and did run to November 8, 1919. (Record pp. 8-11.) The Public Health Service took the property over on the latter date and held it for some three years under a lease to terminate on November 8, 1924. A supplemental contract of that bureau was signed on November 10, 1922, terminating the lease on December 31 following. (Record pp. 9, 10, 20, 21.)

By testimony taken for claimant it was established that the physical renovation of the interior of the hotel building, so as to clear away all seeds of the disease named, for exclusion, in the War Department lease, would cost not less than $325,000; that to repair breakage, in excess of ordinary wear and tear, which occurred during the Public Health Service's holding, claimant has been paid $31,462.03, and that for a period of at least five years, commencing with January 1, 1923, because of the ill repute which the property had acqured from the abuse of it by the War Department, the rental value has been reduced a total sum of not less than $448,000.00. It also was established that the sale value of the property, in 1919 or in 1922 was diminished as much as $600,000.00.

The proofs also show, and the Court of Claims has found (paragraph XIII, Rec. p. 7) that the other first-class hotels at Asheville were highly prosperous that spring, and that the Battery Park Hotel was comfortably filled, until the latter part of April, although steam-shoveling and other work were going on all around, preparatory to the demolition of the hotel itself, in order to make a site for business houses and a more modern hotel; that from lack of accommodations tourists were turned away from the two other hotels, some of them going even to the Kenilworth. As to the Kenilworth itself it was found by the court that, as against a capacity of 450 the average house count per day was 30 guests in March, 35 in April and 22 in May. It was established also that persons who had intended to go to the Kenilworth had gone elsewhere because they had heard it had housed tuberculosis and other contagious diseases, some even cancelling reservations made before they had heard of this fact. The manager appended to his disposition an

itemized statement of the Kenilworth's income and expense, allowing for rent $41,665.65, and showing an operating loss of $55,929.74, making a net operating loss, with no overhead charge, of $14,263.14. This poor result had followed the sending out of 70,000 circular letters before opening the house and advertising afterward through the leading agencies and sending out an expert hotel man to solicit business.

Appellant contends that it is entitled to recover the injury to its reversion as of November 8, 1919, unless that be shown to exceed the expense of thorough renovation plus rental value lost.

In the matter of renovation cost, for disinfection, there was in evidence an estimate of Mr. Dreyer, an architect. The War Department contract then had been liquidated two years before, in 1919, by readjustment of the term and the rent, and Mr. Dreyer was speaking of a matter that lay entirely outside the contract, viz., the infection of the building with disease germs and the necessity of tearing out the interior finish in order to remove those. The contract of 1919-1924 with the Public Health Service carried its own expense, viz., (1) rent and (2) repair, e. g., of broken window frames, door locks, stairway balustrades and any like items which could not be classed as wear-and-tear; and under the adjustment of November 10, 1922, claimant was compensated for those injuries and none other, leaving the matter of renovation, and its cost, to stand as it always had. The Court of Claims having ignored this matter, the motion for a remand in its items 13 and 14 asks that it be directed to make a finding thereon.

The Court of Claims has found that many patients of each class named in the contract for exclusion from

the hospital were treated there, but that in some cases the first step was a surgical operation and in others the banned diseases and others were treated concurrently, and that some diseases, "contagious" or "obnoxious" in the popular sense, were not truly banned. The findings and opinion of the court do not seem to travel the same route exactly but the combined effect is to decide that there was no violation of the contract. The court also decided that neither of the measures of damages stated herein applies and that there are no sufficient criteria for a compensatory judgment.

ASSIGNMENT OF ERROR

On the existing record, errors are assigned as below. It is assumed that they will be more manifest if the findings of fact are enlarged in the ways sought in appellant's motion.

The Court of Claims erred:

(1) In holding that the contract between the Surgeon General and appellant was not breached by the housing and treatment in the hospital of tubercular patients.

(2) In holding that said contract was not breached by the retention and treatment, in the hospital for tuberculosis of a patient on whom a surgical operation, as a part remedy for the same disease, had first been performed there.

(3) In holding that said contract was not breached by the retention in the hospital, first for observation and then for treatment, of a patient suffering with tuberculosis.

(4) In not holding that said contract was breached by the retention and treatment in the hospital for

tuberculosis of a person who was housed there for a surgical operation but on whom no operation was performed.

(5) In holding that said contract was not breached by the housing and treatment of patients for tuberculosis and a concurrent disease.

(6) In holding that said contract was not breached by the housing and treatment in the hospital of syphilitic or typhoid patients.

(7) In holding that said contract was not breached by the housing and treatment of patients for syphilis or typhoid fever and a concurrent disease.

(8) In not holding that said contract was breached by the housing in the hospital temporarily for any length of time whatever, awaiting removal to another hospital, of a person suffering with tuberculosis, on whom it was not intended to perform a surgical operation.

(9) In not holding that said contract was breached by the housing in the hospital temporarily for any length of time whatever, awaiting removal to another hospital, of a person suffering with tuberculosis on whom no surgical operation was performed.

(1) In rejecting, as measures of damage suffered by appellant, both the expense of remedying the same, by physical reconstruction and by lapse of time, and the diminution of the market price of the property.

(11) In not reversing the judgment of the Court of Claims.

LEGAL PROPOSITIONS AND AUTHORITIES

That a tenant, violating a covenant in his lease, is answerable to the lessor for any damage which re-

sults to the property, and that the Government, when a contractor, carries the same liabilities as any other contractor, are commonplaces of the law.

In the case of the *United States* v. *Bostwick*, 94 U. S. 53, relating to the Government's informal renting of a building "for the purposes of a hospital" or "for all purposes," the premises, as variously stated in the negotiations, had been used as a smallpox hospital. The court held that there was a presumption that the lessor expected that a hospital could be operated without restrictions, but that, in any event, the Government was protected by the stipulation "for all purposes." This, surely, implies that, if there had been a stipulation against smallpox or any other named diseases, the owner of the property would have been entitled to compensation for any injury done through those diseases.

In the Massachusetts case of *Delano* v. *Smith*, 206 Mass. 365, it was held that if a contagious hospital, rented under that description, were used for diseases which injured the reversion, this constituted waste and the owner would be entitled to recover the amount of the diminution in market value; the existence and extent of the injury being questions for the jury. In *Hersey* v. *Chapin et al.*, 162 Mass. 176, where a city Board of Health had taken premises without the owner's consent and used them as a smallpox hospital, it had been held that an action lay for any resulting diminution in the rental value. Proof was offered by the plaintiff that a few months after the health authorities surrendered the premises applicants who had offered to lease a part of them objected and withdrew when they heard that there had been smallpox in the building, and the appellate court held that this testi-

mony should have been admitted as bearing on the question of the market value at that time.

On the general question that a lessor is entitled to compensation from the lessee for any injury to the reversionary interest by any unlawful or forbidden act, the following cases are in point:

Higgins v. *Los Angeles Gas & Electric Co.*, 159 Calif. 651.
Cooper v. *Kankakee Electric Light Co.*, 164 Ill. App. 581.
Donk Bros. Coal & Coke Co. v. *Novero*, 135 Ill. App. 633.
Adams & Sullivan v. *Sengel*, 177 Ky. 535.
Toebbe v. *City of Covington*, 145 Ky. 763, quoting *Madisonville* v. *Hardman*, 29 Ky. Rep. 254.
C. N. O. & T. P. Ry. Co. v. *Falconer* (Ky. unofficial) 97 S. W. 729.
Wiggins v. *St. L., M. & S. E. Ry. Co.*, 119 Mo. App. 492.
Slavin v. *State*, 152 N. Y. 45.
Bigbee Fertilizer Co. v. *Scott*, 3 Ala. 333.
Roach v. *Blair*, 190 Mich. 11.
Barrick v. *Schifferdecker*, 132 N. Y. 52.
Graessle v. *Carpenter*, 70 Ia. 116.

The property concerned in *Higgins* v. *Los Angeles Gas & Electric Co.*, *sup.*, was rented from plaintiff by a stranger to the suit and used for a restaurant, and it was burned by a defect in the lighting company's plant. The building was two stories high and plaintiff rebuilt it one story high. In the suit he failed to make competent proof as to the expense of this partial reconstruction, but he proved how much rent he had lost to the end of the rental term, and a judgment for that was affirmed.

In *C. N. O. & T. P. Ry. Co.* v. *Falconer*, *sup.*, where the leased building had been burned, it was held that

the owner was entitled to recover what it would cost to reproduce it although there was no market then for such a building at that place.

In *Toebbe* v. *City of Covington, sup.*, the rule was laid down that in cases of temporary injuries to buildings the owner should recover the reasonable cost of repairing plus the depreciation in rental value during the term sued for, if he occupied the property himself, or the diminution in the value of its use if it were rented.

In principle the same as this latter is stated in Sutherland on Damages, Sec. 1018 (p. 3770) to wit, that if a trespass results in preventing the leasing of property the loss of rental value may be recovered in addition to the cost of repairing it. Obviously, there is the same right of action for a partial loss of rent as for entire loss.

To the same effect is Wood on Landlord and Tenant, Sec. 535 and notes, Second Edition, pp. 1276-1279.

A lessor, while the land is in possession of the tenant, may sue for a nuisance causing injury to the reversion though the nuisance itself may be but temporary. *Bigbee Fertilizer Co.* v. *Scott, sup.*

In *Toebbe* v. *City of Covington*, it was said that successive actions may be maintained by the lessor for a continuing nuisance caused by the lessee.

The owner of a leased building is entitled to recover the rents he lost from the destruction of the building by fire, during the time when he reasonably could have made repairs, notwithstanding that he did not make such repairs. *Higgins* v. *Los Angeles Gas & Electric Co., sup.*

If a defendant has been in possession several consecutive terms the delivery of each new lease by the landlord is not a waiver nor an estoppel of the right to claim damages previously sustained.

> *Sutherland on Damages,* Third Edition, Sec. 856, p. 2552.

The rule that where there has been an implied surrender of posession by acceptance of a new lease the landlord loses all rights dependent upon the continued existence and validity of the surrendered lease applies simply to such rights as can exist only when the lease continues; it does not extinguish rights of action already accrued.

> *McGregor* vs. *Board of Education,* 101 N. Y. 511.

In the light of the authorities above, of the findings made by the Court of Claims, and, to some extent, of facts hypothesized in the motion for a remand upon which there was no dispute, appellant's rights under its contract and injuries it has suffered will now be discussed.

The Contract

The Court of Claims, largely by reason of a change of verbiage made in the contract just before it was signed, concludes that appellant has no valid complaint against anything that was done in the administration thereof.

The first draft of the contract, or proposal, which was submitted to the Surgeon General by appellant's President under a letter dated December 17, 1918, said:

"(2) The building and property are to be leased to the Government for the purpose of a convalescent hospital for disabled officers or soldiers, but it is especially understood, and the lease shall so provide, that no part of the property shall be used for the purpose of treating or housing any person suffering from tuberculosis in any form, or from smallpox or any other contagious or obnoxious disease, provided, however, that this shall not apply to a person suffering from tuberculosis housed temporarily in said premises for an operation or the like."

The text of the substituted clause is as follows:

"(2) The building and property are to be leased to the Government for the purpose of a convalescent hospital for disabled officers and soldiers, but it is especially understood, and the lease shall so provide, that no part of the property shall be used for the purpose of receiving for treatment any person suffering from tuberculosis in any form, or from smallpox, or any other like contagious or obnoxious disease, provided, however, that this shall not apply to a person suffering from tuberculosis housed temporarily in said premises for the purpose of an operation or the like."

The Court of Claims regards the phrase "no part of the property shall be used for the purpose of receiving for treatment" as differing radically from "no part of the property shall be used for the purpose of treating or housing." This conclusion follows naturally enough from the assumptions (1), in the opinion (Rec. p. 38), that "the defendant refused to accept the restriction as proposed," and (2), in the findings, (P. 17), that the Government "objected to the use of the words 'of treating' in the restriction upon the use of the building." Appellant takes a different view of the contract

and says that the court's theories, as here stated, are in conflict with the sole evidence which it seeks by its motion to bring into the record. It admits that the second phrase used in the same sentence of the findings, viz: "suggested in lieu thereof" and—but nothing stronger—is correct.

Firstly, appellant submits that on the face of the restrictions there is no difference in their meaning except that the language adopted is slightly more accurate than that first employed. "Property" in each case is the subject of the restriction; while the thing inhibited was, the one case "treating or housing" and in the other case "receiving for treatment." A meticulous stylist, such as puts the last touch upon Government papers, would readily see the ineptitude of the word "treatment" to a building. "Treatment" is done by medicines, by watchful attention to the patient's body in all its functions, by physical exercise carefuliy limited, etc.; it is not done by a house. A house can do no more than receive and shelter a person. So in speaking of the functions of a house or "property" the correct term to employ was "receiving for treatment," not "treating."

Secondly, the proviso which limits the restriction is the same in both cases, viz. "that this [restriction] shall not apply to a person suffering from tuberculosis housed temporarily in said premises for the purpose of an operation or the like." If it were intended to permit (a) the retention of surgical patients, after reaction from the operations, and their treatment for tuberculosis, or (b) the retention for tuberculosis treatment of persons who at their entry were not supposed to have that disease, or (c) the concurrent treatment of tuberculosis and some other disease, would not some phrase have been inserted by the lynx-eyed offi-

cers of the Surgeon General's bureau to express the purpose?

In these observations the restrictive clauses are read by their four corners. The motion for a remand in its item 1 suggests that if the occasion and method of the change were known to this court the case would be clearer still. On another point, to wit: leasing for one year with optional renewals instead of five years, the Court of Claims has shown that the change involved considerable of elucidation and delay (Findings, pp. 17, 25-28). If there was no explanation by the Surgeon General's office and no delay in the re-writing of the restrictive clause—if nothing occurred beyond the suggestion of the change by the contracting quartermaster on one day and its acceptance without comment by appellant's President two days later—will not the conclusion follow irresistibly that the parties supposed they were making a change of form only, not of substance? If appellant was keen, when making its first offer to the Surgeon General, to safeguard the property and its reputation against "housing or treatment" of tubercular patients (Rec. pp. 3, 37), would it have consented a month later, without a word of protest, to the licensing of tuberculosis treatment in the building.

Suppose the officer in charge at Kenilworth (Motion, item 5) in answer to protests by appellant's President, admitted that he was violating the contract and pleaded the unexpected urgencies of the Government; is that a negligible fact?

Is it not more important still, if true, that officers in charge wrote to their superiors that they were housing and treating tubercular patients and that this was a breach of contract (Motion, items 2 and 3).

Finally, if the Secretary of the Treasury, when considering the taking over of this property for the Public Health Service, detailed an officer to making investigation, looking to the operation of a hospital, and this officer in his report pointed out that the army lease did not carry the "privilege of treating tubercular patients," would not this put a different light on the contract from that in which the Court of Claims has viewed it? (Motion, item 4.)

As regards syphilis and typhoid the Court of Claims decides that the contract gave the Medical Corps a free hand. The argument counts on the words, in the restrictive clause, "from smallpox, or any other like contagious or obnoxious disease." No other disease, says the court, except measles is so contagious as smallpox, and therefore syphilis and typhoid are not included in the words "like smallpox." The court refrains from asserting that these words were intended to include measles and nothing more; but it reads the restriction to mean "any person suffering from tuberculosis in any form, or from smallpox or from measles" (pp. 18, 22, 23).

In view of the fact that many syphilitic and typhoid patients, and nobody suffering from measles, was received and treated in this hospital, it seems to counsel for appellant that the Government, not appellant, should be "heard" upon this interpretation of the arrangements of the Medical Corps.

Breaches of the Contract

If the view, or views, which the Court of Claims takes of the administration of the Kenilworth hospital were correct and were sufficiently compensive, appellant, obviously, would have little room to say its rights

were invaded. Appellant *per contra* submits that some of the court's statements are not supported by any evidence in the record and that some of the most important facts, established by the entire and harmonious evidence (Motion, items 2, 5, 6) are ignored in the findings. But the court's conclusions as they stand are not so positive, in the denial of all actionable injury to appellant, as they might seem at a glance. The words "none of these patients was received in said hospital for treatment of tuberculosis" in finding (Rec. p. 21) are no more significent than the statement that some were taken in to be treated for tuberculosis and concurrent diseases and that some (fifty-nine) patients were found on observation to be suffering from tuberculosis; and these statements cannot be consdered fairly unless the court has those details which appellant's motion suggests. That tubercular patients were removed "as soon as practicable" and that "it was not the purpose or practice of the medical authorities having said hospital in charge to house tubercular patients therein otherwise than temporarily" are more conclusions, to be tested in this court by the real evidence for which the motion calls. "Temporarily." If the treatment continued until the medical authorities' occupancy of the property terminated, to-wit, on November 8, 1918, can it fairly be called "temporary." For the purpose of this contract it would seem to be as permanent as possible. Item 9 of the motion aims to produce the facts of this particular.

Besides, the contract did not give the Medical Corps any discretion and power to lodge and treat tubercular patients in the hospital for any reason, though temporary, which might appeal to their medical or military judgment. Except for surgical operations and for

such recuperation therefrom as would permit travel by the patients, it closed the doors of the hospital against all persons known at the outset, or discovered later, to be suffering from tuberculosis.

In comparing this case with *Hersey* v. *Chapin*, 162 Mass. 176, and *Delano* v. *Smith*, 206 Mass. 365, the Court of Claims says:

> "A tenant in possession of a dwelling house under a lease is assuredly obligated, as these cases hold, to refrain from subletting the premises for use as a smallpox hospital—a pesthouse—to the injury of the reversion. The distinction, a very important one, between the cases cited and the issue here is that the owner of the premises, the owner of the reversion, let the premises as an original proposition for use as a hospital. By its own lease the plaintiff contemplated the incidental injury to the reversion arising from mere use and occupation, if any such occurred, and is presumed to compensate itself therefor in the fixed rental. The issue here is a direct contractual relationship between the owner of the premises and the tenant, and an allegation of breach of the same."

What possible difference of legal right and wrong can there be between abuse of a hotel and abuse of any other building? In this case the lessor anticipated a possible abuse of the hotel, in the administration of the contract, and took pains at the outset to protect itself therefrom. Claimant did not contemplate, and fix his rental price for, any incidental injury to the reversion except breakage and other like deterioration; and for this and nothing more it was afterward paid through findings of an army claims board.

What claimant "contemplated" in relation to tuberculosis, smallpox and other contagious diseases—

its horror of these agents of destruction—appears too clearly for question from its offer, as below, to the Surgeon General set out at page 18 of the record.

> "*Restriction against tuberculosis.*" "The restriction in the use of the property against the housing or treatment of patients suffering from tuberculosis, is from our standpoint as the owners and future operators of the hotel, necessary, as such a use would forever destroy the property for the purpose for which it was constructed. The question of our ability, under proper medical advice, to renovate and disinfect the premises, thereby removing all danger of infection, does not arise —the danger of infection could no doubt be altogether removed, but it would cost us a fortune in advertising to convince the traveling public of this fact, and even with such an expenditure there would be no assurance of success in the undertaking. The same applies with equal and even more force to other contagious diseases of the character of smallpox, etc."

One hope of appellant (Motion, item 5) in seeking a remand to the Court of Claims is to show that from the outset appellant protested that the Medical Corps, in harboring tubercular and syphilitic persons for other purpose than surgery, was inflicting an injury on its property in excess of any that could follow from the uses authorized by the contract.

The Court of Claims at some places in the findings and opinion has used very positive words and at other places has qualified those by other words; and in some instances words, or phrases, contradictory of each other have been used at different places. But, on a fair summing up of all that is said, the court's conclusions are as follows:

That the contract was not violated unless a person known to be suffering with tuberculosis or syphilis was taken into the hospital to be treated, and was treated for one of the diseases, without surgery and without treatment for or observation of any other malady; that when a surgical operation had been performed and its own effects were healed, or after an intention of operating had been abandoned, treatment for tuberculosis or syphilis was permissible; that a person receiving treatment for tuberculosis concurrently with some other disease was not a "tubercular" patient; that syphilis, except in an advanced stage, was not banned by the contract and that the court does not know as to any of the patients housed and treated whether this disease existed in its tertiary form.

We do not believe that any such version of the contract will bear the scrutiny of this court.

The Court of Claims, while distinguishing early stages and advanced stages of syphilis—holding the latter alone to be within the contract restriction—does not find whether, among the patients who were housed and treated in this hospital, any had syphilis in what is popularly known as the advanced stage, viz: the tertiary. Seeing that, upon an affirmative finding in this particular, it could not be questioned that the contract was violated, it is obvious that some finding should be made, and this is sought by item 8 of the motion for a remand.

The Court of Claims, while not treating very thoroughly of appellant's injury, rather makes light of the unprofitable patronage which the Kenilworth hotel, from its opening in February, 1924, until the institution of the second suit, received. The facts that an insurance convention of 90 persons was entertained for six days in March and a medical society of 92 persons,

five days in April, seem to be regarded as more important than the average of the entire trade, viz: 30 in March, 35 in April, 22 in May and 20 in June .

The relation of these two large bodies of patrons in two months to the general average for the months is not considered. Thirty patrons a day for thirty-one days, means 930 as a month's total; but 90 insurance men for 6 days means 540 days' business, an average for the remaining 24 days of the month of 20 persons; and 92 physicians for 5 days means 460 days' business, leaving for the remaining 25 days of the month a total of 590 persons, averaging 23 persons per day. So it is evident that during March, with the exception of the days named, there were only about 20 persons in the house and in April, with the exception of the 5 days named, only a little more than 23 persons.

Measure of Damages

The injury of which this suit complains matured when the lease of the Medical Corps was terminated by agreement and the Public Health Service took the property over. It consisted of two items, (1) the expense of so renovating the building that no factors of disease infection would remain, and (2) the diminution, *i. e.*, destruction *pro tanto* of the property's rental value for a time to follow upon the removal of the noxious patients. The amount of the first of these could have been ascertained instantly by a competent architect; while it was equally appropriate for the owner of the property, if it chose to take the risk and not wait for actual demonstration, to prove forthwith by experts in the two fields, the length of time required for the property to live down its bad reputation and the loss of rental value that would occur during that

period. Another measure of the damage, if not in excess of that indicated, was the reduction of the property's sale value.

Probably it is not out of place to say that the full proof, covering this alternative, was made before the case was submitted to the Court of Claims. Of course, the allowance of either amount, or of any amount whatever, was a moot question when the Court of Claims had reached the conclusion that appellant had no right of action. All that the court has said in this connection is its finding IX (Rec. p. 23) as follows:

> "The occupancy of the Kenilworth Inn by the Government as a general hospital, excluding therefrom patients with tuberculosis and other contagious or obnoxious diseases, would have reduced the rental value of the property as a hotel after its surrender by $50,000 per annum. What further reduction, if any, in rental value was caused by the housing and treatment of patients suffering from tuberculosis, typhoid, or venereal diseases does not satisfactorily appear from the evidence."

Obviously, injury to the property (if proved) by uses which did not violate the contract, has no pertinence to this suit. If the contract *was* violated, proof, in the alternative above, is necessary before a judgment can be entered. The purpose of items 12 and 13 in appellant's present motion is to bring the facts into the record.

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